Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO,

Petitioner,

v.

R.L. COOLSAET CONSTRUCTION CO.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the lower courts erred in awarding damages which Plaintiff never demonstrated to be actually sustained by the Plaintiff, but rather, were simply speculative?

Whether the lower courts erred in awarding Plaintiff prejudgment interest?

LIST OF PARTIES

Petitioner is the International Union of Operating Engineers, Local 150, AFL-CIO.

Respondent is R.L. Coolsaet Construction Company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

CITATIONS TO OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

Statement of Facts 2

Proceedings in the Courts Below 7

REASONS FOR GRANTING THE WRIT:

I. THE LOWER COURT ERRED IN APPROVING THE DAMAGES AWARD AND ITS DECISION CONFLICTS WITH THIS COURT AND OTHER SELECTED CIRCUIT LAW 9

II. THE LOWER COURT ERRED IN APPROVING AN AWARD OF PREJUDGMENT INTEREST WHICH CONFLICTS WITH THIS COURT AND OTHER SELECTED CIRCUIT LAW 15

CONCLUSION 22

APPENDICES

A – Opinions and Judgments Below ..... App. 1

B – Statutes Involved ..... App. 71

TABLE OF AUTHORITIES

Page

CASES

American Bridge Div., U.S. Steel v. Intern. Union, 722 F.2d 1547 (11th Cir. 1985) 10

Board of County Commissioners of the County of Jackson v. United States, 308 U.S. 343, 60 S.Ct. 285 (1939) 16

Beelman Truck Co. v. Chauffeurs, Teamsters, Warehousemen and Helpers, 33 F.3d 886 (7th Cir. 1994) 16, 19, 21

Boxhorn's Big Muskego Gun Club, Inc. v. Electrical Workers Local 494, et al., 798 F.2d 1016 (7th Cir. 1986) 10, 11

Gorenstein Enterprises v. Quality Care-USA, 874 F.2d 431 (7th Cir. 1989) 15, 16, 20

Knapp v. Eagle Property Management Corp., 54 F.3d 1272 (7th Cir. 1995) 11

Local 20, Teamsters v. Morton, 377 U.S. 252 (1964) 10, 13

Loeffler v. Frank, 486 U.S. 549, 108 S.Ct. 1965 (1988) 15

Matson Plastering Company, Inc. v. Plasterers & Shophands Local 66, 852 F.2d 1200 (9th Cir. 1988), *cert. denied*, ___ U.S. ___ (1989) 13, 14

Michaels v. Michaels, 767 F.2d 1185 (7th Cir. 1985) 20

Mid-America Tablewares v. Mogi Trading Co., 100 F.3d 1353 (7th Cir. 1996) 10

NLRB v. Servette, Inc., 377 U.S. 46 (1964) 18

Olympia Equipment Leasing Co. v. Western Union, 797 F.2d 370 (7th Cir. 1986) 10

TABLE OF AUTHORITIES – Continued

Page

Sailor's Union of the Pacific (Moore Dry Dock), 92 NLRB 547 (1950) 16, 19

St. Louis & O'Fallon Ry. Co. v. United States, 279 U.S. 461, 49 S.Ct. 384 (1929) 16

Taliferro v. Augle, 757 F.2d 157 (7th Cir. 1985) 11

Tresco Brothers Sand & Gravel v. Truck Drivers Local 170, 19 F.3d 63 (1st Cir. 1994) 10, 11

Ustrak v. Fairman, 781 F.2d 573 (7th Cir. 1986) 11

Wickham Contracting v. Local Union No. 3, IBEW, 955 F.2d 831 (2nd Cir. 1992) 16, 17, 18, 20

Zazu Designs v. L'Oreal, S.A., 979 F.2d 499 (7th Cir. 1992) 11, 14

STATUTES

28 U.S.C. §1254(1) 1

Labor Management Relations Act, as amended, §§301, 303, 61 Stat. 156, 29 U.S.C. §§185, 187.. *passim*

National Labor Relations Act (NLRA) (as amended), §§8(b), 8(e), 61 Stat. 140, 29 U.S.C. §158 ..... *passim*

PETITION FOR WRIT OF CERTIORARI

Petitioner, International Union of Operating Engineers, Local 150, AFL-CIO, prays that a Writ of Certiorari be issued to review a judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on May 7, 1999.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 177 F.3d 648 (7th Cir. 1999) and is presented in its entirety in Appendix A, *infra* at pages App. 1 through App. 25. The Memorandum Opinion and Order of the District Court is unreported but printed in its entirety at Appendix A, *infra* at pages App. 26 through 70.

JURISDICTION

The U.S. District Court for the Central District of Illinois, entered judgment on November 21, 1997, which the Clerk of the Court entered on November 24, 1997. The U.S. Court of Appeals for the Seventh Circuit affirmed that judgment on May 7, 1999. The U.S. Court of Appeals for the Seventh Circuit denied a timely petition for rehearing on June 14, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved here are the National Labor Relations Act (NLRA) (as amended), §§8(b), 8(e), 61 Stat. 140, 29 U.S.C. §158; and the Labor Management Relations Act, as amended, §§301, 303, 61 Stat. 156, 29 U.S.C. §§185, 187. The language of these statutory provisions is set forth in Appendix B, *infra* at pages App. 71 through 79.

STATEMENT OF THE CASE

Statement of Facts

Local 150 is an unincorporated association and a labor organization representing employees in the construction, material production and pipeline industries throughout Northern Illinois, Northern Indiana and Eastern Iowa (App. 31). At all times relevant to this action, Business Agents Mike Quigley and Gary Benefield were assigned to District 2, which covers Kankakee, Will and Grundy Counties, Illinois (App. 32). At all times relevant to this action, Roger Seale worked for Coolsaet as an operator and acted as the Union steward on the jobsite (Tr. 111, 138, 153).[1] As a Union steward, Seale is not an agent or officer of the Union (Tr. 136-38, 153-63). Seale's responsibilities as a Union steward primarily included calling the operators when the project first started and preparing the steward's reports (Tr. 137).

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[1] All references to the Transcript of Proceedings conducted on April 1 through April 3 and May 6, 1997 will be cited to as "Tr. ___."

Coolsaet is a corporation headquartered in Romulus, Michigan and is in the business of underground pipeline repair (App. 31). Ryan Colonello is Coolsaet's manager and is responsible for the preparation of bids and oversight of all its pipeline construction and repair work (App. 31). Prior to beginning work at the Herscher, Illinois work site, Coolsaet entered into an agreement with Local 150 which incorporated the terms of the National Pipeline Agreement (App. 36).

Natural Gas Pipeline Company of America ("NGPL") operates as a natural gas storage and distribution facility located on Herscher Road near Herscher, Kankakee County, Illinois, known as the Herscher-Galesville Storage Field (App. 33). The Storage Field is located beneath several hundred acres of arable land to which NGPL holds a variety of easements, leases, and mineral rights (App. 33-34). The facility is capable of storing 65 billion cubic feet of natural gas (App. 33-34).

The Storage Field houses an 80-acre, fenced-in, rectangular parcel where NGPL operates its compression equipment, known as Station 201 (App. 33-34). Station 201 fronts on Herscher Road and has three entrance gates (App. 34).

In 1991, NGPL awarded a series of contracts to excavate, install, and perform maintenance on gas and water pipelines leading into its compressor Station 201 (App. 34). NGPL awarded Coolsaet the contract to perform the project's first phase: repairing and upgrading the underground natural gas pipe at Station 201 (App. 34). Coolsaet began work on the contract's first phase in 1991 (App. 34). In 1992, NGPL awarded a contract to Haley Brothers

Excavating, Inc. ("Haley"), a non-union corporation, for a water distribution project in Herscher, Illinois, as well as a contract to perform water pipe maintenance and installation work (App. 35).

On or about June 19, 1992, Haley began installation of water line work at the Herscher facility (Tr. 20-23). On or about June 22, 1992, Union steward Seale noticed the presence of Haley on the job site and contacted Local 150 Business Agent Benefield (App. 36). On June 23, 1992, Benefield and Seale drove out to the location where Haley was working and Benefield spoke to one of Haley's owners in an attempt to persuade him to sign a contract with Local 150 (App. 38). When Haley refused, Benefield decided to picket Haley for recognition (Tr. 269). Accordingly, on June 24, 1992, Local 150 began picketing Haley at Gate 1 of the Herscher facility and along the right-of-way where Haley performed its work.

At no time did Local 150 indicate its dispute was with any one other than Haley. It is uncontested that the Union's picket signs at all times identified Haley as the offending contractor (App. 36-37). NGPL understood the dispute to be between Local 150 and Haley (Tr. 81). Local 150 never stated that the dispute was with Coolsaet or NGPL (Tr. 363, 370, 472); or otherwise attempted to draw them into the dispute (Tr. 374, 469-474). Indeed, Coolsaet Superintendent Reeve admitted that at no time did Local 150 agents threaten Coolsaet or ask it to pressure NGPL to remove Haley (Tr. 469-471).

Coolsaet and NGPL originally planned the Herscher project to take between 10 and 11 weeks (Tr. 72, 539). Coolsaet performed about three weeks of that work in

1991 (Tr. 72). On April 13, 1992, Coolsaet resumed work on the project (Tr. 437). When on June 23, the picketing began and worked ceased, Coolsaet had already been working on the project 12 to 13 weeks. Coolsaet claims it projected the project would have been "tied in" – that is, the field back in service, two weeks later on or about July 4 (Tr. 578) for the clean-up portion of the work. However, another two weeks still remained (Tr. 94-95, 541). Although there was no "schedule" of work, no deadline and no penalties for failure to complete the project by a designated date (Tr. 545), the project was already six to seven weeks behind schedule at the time the picketing began.

On June 12, 1992, Coolsaet and NGPL projected the completion of "Phase I" of the project (other than clean-up) for July 10, 1992 (Pltf. Ex. 58; Tr. 62). "Some time" after that memo was written, Nightengale stated the completion date was moved up because "things were going well" (Tr. 62). On June 8, 1992, Coolsaet moved to a "7/11" schedule (7 days per week, 11 hours per day), a schedule which continued up to the beginning of picketing (Def. Ex. 36). After the picketing ceased, however, Coolsaet returned to the previous "6/10" schedule (Tr. 459). As Colonnello explained, once the "target date of approximately July 4 had already passed," there was no longer a "push for a final tie-in," and Coolsaet chose not to incur the additional overtime costs (Tr. 529).

Coolsaet asserts that the 10 days of picketing delayed completion of the "tie-in" portion of the project by four weeks. It argues that the picketing delayed the project two weeks, but that it incurred expenses for an *additional*

two weeks' delay as a result of "remobilization problems," "rework" and "weather-related delays" (Tr. 580). Superintendent Reeve conceded that weather routinely delays both completion and start days; indeed, weather is even factored in when making a bid (Tr. 452). Colonnello admitted, however, that Coolsaet did not calculate the two weeks' additional delay based upon these problems (Tr. 581); and, in fact, the days of delay which the Company could attribute to each of those problems do not correlate to the full two weeks (*see*, Tr. 480-81). Instead, Colonnello simply compared the date for the projected final "tie-in" of July 4 to the actual "tie-in" of early August (Tr. 579).

On September 10, 1992, NGPL Chief Inspector Filiatrault wrote a memo to his supervisors analyzing the project (Def. Ex. 40; Filiatrault Dep. 100-101). There, Filiatrault stated that "no single factor" related to the delay (Filiatrault Dep. 127). Instead, he indicated that both concrete replacement and several gas lines which were to be replaced were not on project blueprints could have caused the delay (Def. Ex. 40; Filiatrault Dep. 124-125; *see, also* Tr. 80 gas lines were found in "odd spots").

Coolsaet incurred no out-of-pocket equipment expenses while picketing idled the job. Coolsaet owned all its equipment at Hersher out right (Tr. 563-64). Hence, it did not pay to anyone the $68,651.00 awarded, nor did any bill for that amount go unpaid (Tr. 562). Nor did Coolsaet attempt to rent its idle equipment to anyone else during the picketing because, as Colonnello explained, it would be needed at the site to finish the job once the picketing ended (Tr. 566). Finally, Coolsaet based its calculation of $68,651.00 on an hourly rental rate negotiated

with the Company for extra work (Tr. 562; Def. Ex. 2). However, that rate is used when equipment is actually running to reflect wear-and-tear (Tr. 568-569). Where, as here, equipment is idle, the negotiated contract rate between Coolsaet and NGPL is the lower "stand-by" rate (Tr. 560).

Coolsaet calculates profits and losses on each of its projects and throughout them. (*see, e.g.*, Def. Ex. 24, 25; Tr. 726). In 1992 and 1993, Coolsaet averaged 7.12 and 25.31 percent profit per job (Tr. 762). Colonnello testified that when he bid the Herscher job, he projected a profit of 20 to 25% (Tr. 598) – profit margins the Company considered "good" (Tr. 596). Based upon Coolsaet's profit and loss records for 1991 and 1992, Coolsaet realized a total profit on the Herscher job of 25.97% (Tr. 727-28).

Proceedings in the Courts Below

On June 24, 1992, Local 150 established a recognitional picket against non-union contractor Haley Brothers at the Natural Gas Pipeline Company of America's Herscher facility, located in Herscher, Kankakee County, Illinois. The picketing lasted eleven days. On September 5, 1992, Coolsaet sued Local 150, as well as William E. Dugan and Michael J. Quigley, individually, and John Doe and Jane Doe, *et al.*, as members of the Defendant Local 150, for damages. Coolsaet alleged claims under 29 U.S.C. §158(b)(4) for damages for unlawful secondary picketing in violation of 29 U.S.C. §187 of the National Labor Relations Act, and for breach of a collective bargaining agreement.

By order of September 19, 1994, the District Court denied the parties' respective Motions for Summary Judgment. Neither party sought a Motion for Reconsideration. On March 1, 1995, the parties filed a Joint Pre-Trial Order in which the parties stipulated to the dismissal of the claims against the individual defendants William Dugan, Michael Quigley, and John and Jane Does.

Beginning April 1, 1997, the Court conducted a bench trial on Coolsaet's claims. On November 21, 1997, the Court issued a written Order awarding Coolsaet $329,467.46 in damages. On December 4, 1997, Local 150 filed a timely post-trial motion, pursuant to Fed. R. Civ. P. 59, seeking to alter or amend the judgment entered against it on November 24, 1997. On January 12, 1998, Local 150 subsequently filed a second post-trial motion pursuant to Rule 60, Fed. R. Civ. P., to correct a misnomer in the judgment entered November 24, 1997. By orders of March 30, 1998, the Court denied Local 150's Motion to Alter or Amend Judgment, but granted Local 150's Motion to Correct Misnomer.

On December 11, 1997, Coolsaet filed its Request For Prejudgment Interest and Memorandum in Support thereof. By Order of April 9, 1998, the Court awarded Coolsaet $16,097.14 in prejudgment interest. On April 21, 1998, Coolsaet filed its Request for Reconsideration of the Court's Prejudgment Interest Award. On May 19, 1998, the Court granted Coolsaet's Motion and amended the Judgment to include prejudgment interest in the total amount of $105,221.12.

On April 28, 1998, Local 150 filed a timely notice of appeal to the United States Court of Appeals for the Seventh Circuit appealing from the final judgment entered by the District Court on November 21, 1997 and the May 19, 1998 award of prejudgment interest.

On May 7, 1999, the United States Court of Appeals for the Seventh Circuit affirmed the judgment in part, reversed the judgment in part, and remanded the case to the district court for recalculation of prejudgment interest. On May 25, 1999, Petitioner timely petitioned the Court of Appeals for a rehearing with suggestion of rehearing *en banc*. By Order entered June 14, 1999, the Seventh Circuit denied the petition for rehearing and suggestion for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURT ERRED IN APPROVING THE DAMAGES AWARD AND ITS DECISION CONFLICTS WITH THIS COURT AND OTHER SELECTED CIRCUIT LAW

Section 303 provides in pertinent part, 29 U.S.C. §187 (emphasis added):

> . . . Whoever shall be injured in his business or property by reason [of] any violation of [29 U.S.C. §158(b)(4)] may sue therefor in any district court of the United States . . . and shall recover *the damages by him sustained* and the costs of the suit.

Accordingly, §303 permits an injured party to recover the actual damages sustained by reason of a violation of

§8(b)(4) of the Act. Indeed, in *Local 20, Teamsters v. Morton*, 377 U.S. 252 (1964), the Court stated clearly that damages recoverable under §303 "should be limited to actual, compensatory damages." *Id.* at 260. Further, the Plaintiff is only entitled to damages caused by reason of the unlawful activity and may not obtain "damages proximately caused by lawful, primary activities, even though the petitioner may have contemporaneously engaged in unlawful acts elsewhere." *Id.* at 261-262. Accordingly, courts following *Morton* have stated that a plaintiff must demonstrate that it was injured by reason of the unfair labor practice and there is a "causal nexus" between the §8(b)(4) violation and the injury. *Tresco Brothers Sand & Gravel v. Truck Drivers Local 170*, 19 F.3d 63, 65 (1st Cir. 1994); *Boxhorn's Big Muskego Gun Club, Inc. v. Electrical Workers Local 494, et al.*, 798 F.2d 1016, 1020 (7th Cir. 1986). Therefore, the "guiding principle in establishing Section 303 damages is neither punishment nor speculation." *American Bridge Div., U.S. Steel v. Intern. Union*, 722 F.2d 1547, 1553 (11th Cir. 1985). Here, the lower court erred in affirming a damage award which Coolsaet failed to show were incurred by reason of unlawful conduct by the union or were actually sustained by Coolsaet. Moreover, the evidence established that Coolsaet suffered no economic loss or out-of-pocket expense which it could directly attribute to Local 150.

The Seventh Circuit has repeatedly reversed speculative, unfounded damage calculations. *Mid-America Tablewares v. Mogi Trading Co.*, 100 F.3d 1353, 1367-69 (7th Cir. 1996); *Boxhorn's Big Muskego Gun Club v. Local 494*, 798 F.2d 1016, 1021-23 (7th Cir. 1986); *Olympia Equipment Leasing Co. v. Western Union*, 797 F.2d 370, 382-83 (7th Cir.

1986). Indeed, as the Seventh Circuit has required , "compensatory damages must rest on a just and reasonable estimate of the damage based on relevant data." *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 506 (7th Cir. 1992) (internal quotation marks omitted). Damages "must be proved in order to be recovered; a plaintiff who wants substantial damages can't just ask for them." *Ustrak v. Fairman*, 781 F.2d 573, 579 (7th Cir. 1986). *Accord Knapp v. Eagle Property Management Corp.*, 54 F.3d 1272, 1281 (7th Cir. 1995); *Taliferro v. Augle*, 757 F.2d 157, 162 (7th Cir. 1985). Presently, Coolsaet completely failed to establish a "causal nexus" between any unfair labor practice and its purported injury. *See Tresco Brothers Sand & Gravel v. Truckdrivers Local 170*, 19 F.3d 63, 65 (1st Cir. 1993); *Boxhorn*, 798 F.2d at 1021-1023 (court must carefully distinguish harm suffered from unlawful secondary activity as opposed to harm from legitimate primary activity).

The essence of Coolsaet's damage claim, which the Seventh Circuit affirmed, is that the picketing by Local 150 delayed completion of the Herscher-Galesville project, thereby causing it to incur increased costs and as a result, a reduced profit. It is first important to recognize that Coolsaet's use of the term "delay" is misleading. It was uncontested that there was no schedule of work agreed upon by Coolsaet and NGPL, no contractual deadline, and no penalties on Coolsaet for failure to complete the project by a designated date (Tr. 545).

Next, the Seventh Circuit manifestly erred when it found that the "post-strike delay resulted from work that had been redone and lost time and efficiencies re-mobilizing the project" (App. 18); and that "the damages figure includes increased payroll and equipment expenses as

well as other miscellaneous expenses associated with the strike-induced delay" (App. 18). These findings are inconsistent with both Seventh Circuit precedence as well as Supreme Court decisions.

The Seventh Circuit's most significant error occurred, however, in its conclusion that these delays prolonged the job by twelve (12) days. According to the Seventh Circuit, the delays, "are directly attributed to the strike and the expenses asserted with them are compensable" (App. 18). However, the evidence relied upon by the lower court does not establish that the costs were incurred by reason of Local 150's conduct or that they were actually sustained by Coolsaet. For example, as Coolsaet witness Colonnello admitted, he did not calculate the "delay" damages sought based upon the actual delay factors (Tr. 581). Colonello admitted that he calculated the 12 days' delay *not* on actual rework, but *only* on the difference between his projected tie-in and the "actual" tie-in (Tr. 579, 581). The crucial problem with that "calculation" is that it rests on a "projection" which was itself speculative and, indeed, extremely suspect.

Coolsaet and NGPL originally planned the Herscher project to take between 10 and 11 weeks (Tr. 72, 539; Def. Ex. 2). Coolsaet performed about three weeks of that work in 1991 (Tr. 72; Def. Ex. 24). On April 13, 1992, Coolsaet resumed work on the project (Tr. 437; Def. Ex. 36; Def. Ex. 37). When, on June 23, the picketing began and worked ceased, Coolsaet had, therefore, already been working on the project nearly 13 weeks. The Company claims it projected the project would have been "tied in" – that is, the field back in service – two weeks later on or about July 4 – 14 or 15 weeks of total work (Tr. 578). The

clean-up portion of the work, however – approximately another two weeks – still remained – up to 17 weeks total (Tr. 94-95, 541). Hence, the project was already six to seven weeks *behind* its projected schedule *at the time the picketing began*. Obviously, "projections" with no economic significance to the parties to the construction project are an unreliable gauge upon which to impose significant damages upon Local 150.

Perhaps more significant is the fact that NGPL officials – those truly neutral to the current dispute between Local 150 and Coolsaet – estimated the project at only 70% complete at the time the picketing began (Pltf. Ex. 31). Indeed, it is this 70% figure which is proven valid by the project's actual experience.[2] The lower court's acceptance of Coolsaet's "delay" damage claim therefore rests entirely on a speculative "projection" unsupported by the actual business records relating to the project. Assuming the project was delayed at all, the lower courts moreover ignored the testimony of NGPL Inspector Filiatrault that the strike was only one of three factors which delayed completion of the project (John Filiatrault Dep. 127). In any event, the evidence is simply inadequate to support a damage award of over $300,000 which the Seventh Circuit affirmed. Furthermore, it is well settled that *only* actual damages are compensable under Section 303. *Local 20, Teamsters v. Morton*, 377 U.S. 252, 260 (1964). According to the Ninth Circuit Court of Appeal in *Matson Plastering*

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[2] Completion of the project took another 5 weeks of work after the picketing ceased, for a total of 18 weeks. 70% of 18 weeks is 12.6 weeks, almost precisely the number NGPL estimated had been done at the time the picketing began.

Company, Inc. v. Plasterers & Shophands Local 66, 852 F.2d 1200, 1203 (9th Cir. 1988), *cert. denied*, ___ U.S. ___ (1989), the "language of the statute, its legislative history and judicial interpretation make clear that damages recoverable under Section 303 include actual compensatory damages for out-of-pocket expenses paid to third parties as a result of the picketing. . . . " By affirming Coolsaet's award of over $300,000.00 in damages, most of which were not out-of-pocket expenses, the lower court's ruling conflicts with the rule established in the Ninth Circuit, as well as the Court's rationale in *Morton*. Coolsaet originally identified six categories of "damages" it calls "costs," totaling $90,050.50 (Pltf. Ex. 61). The single biggest item, that of equipment, was not a "cost" at all and should not have been considered actual damages for out-of-pocket expenses paid to third parties under Section 303. First and foremost, Coolsaet conceded that it owned all of its equipment used at Herscher outright (Tr. 563-564). Coolsaet did not try to rent that equipment out elsewhere and paid no one the $68,651.00 claimed (Tr. 566, 562). That entire amount should have been deducted from the damage claim. Similarly, the various payroll and labor items it identifies as "costs" are, in fact, monies it would pay those employees anyway, and which are not customarily attributed to any given job. These items (totaling $12,864.63) should also have been deducted from the claim.

Finally, that Coolsaet is entitled to no or, at most, minimal damages is confirmed by its own business history. *Cf., Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499 (7th Cir. 1992) (lost profit claim impermissibly speculative, no track record of sales or evidence of comparable profits

offered). Coolsaet routinely calculates profits and losses on each of its projects. In bidding on the Herscher project, Colonnello conceded that he was projecting a profit of up to 25% (Tr. 598) – a "good" profit which the Company, in fact, realized (Tr. 596). By affirming the District Court's decision in awarding over $300,00.00 in damages, Coolsaet received a windfall in damages.

II. THE LOWER COURT ERRED IN APPROVING AN AWARD OF PREJUDGMENT INTEREST WHICH CONFLICTS WITH THIS COURT AND OTHER SELECTED CIRCUIT LAW

The Supreme Court has noted that an award of prejudgment interest should be a function of (1) the need to fully compensate the wronged party for actual damages suffered; (2) consideration of fairness and the relative equities of the award; (3) the remedial purpose of the statute involved; and/or (4) such other principles as are deemed relevant by the court. *Loeffler v. Frank*, 486 U.S. 549, 557-558, 108 S.Ct. 1965, 1970-71 (1988). The Seventh Circuit has found that prejudgment interest should be available to victims of federal law violations, but only where "the violation was *intentional*, and indeed *outrageous* (emphasis added)." *Gorenstein Enterprises v. Quality Care-USA*, 874 F.2d 431, 436 (7th Cir. 1989). Here, by affirming Coolsaet's award of prejudgment interest, the lower court went against its own precedent, especially when Local 150's conduct, although arguably found to be violative of Section 303, was neither intentional nor outrageous.

Local 150 did not *intentionally* violate the reserved gate system *because Coolsaet did not establish one.* Indeed, Local 150 can and did express its primary intent sentiments both to the primary employer as well as secondary or neutral employers. Therefore, although the court found Local 150's conduct to be violative of Section 303, the record contains no evidence to show that "the violation was *intentional,* and indeed *outrageous* (emphasis added)." *See, Gorenstein Enterprises.*

At best, Local 150 believed that it engaged in protected, concerted activity, while it picketed Haley Brothers at the Herscher jobsite, in compliance with the guidelines established by the Labor Board in *Moore Dry Dock. Sailor's Union of the Pacific (Moore Dry Dock),* 92 NLRB 547 (1950). In the two seminal Section 303 cases in which Appellate Courts have awarded prejudgment interest, *Beelman Truck Company v. Chauffeurs, Teamsters Local 525,* 33 F.3d 886 (7th Cir. 1994), and *Wickham Contracting v. Local Union No. 3, IBEW,* 955 F.2d 831 (2nd Cir. 1992), both Courts specifically found *intentional* misconduct on the parts of the defendants.

In *Wickham,* the Second Circuit noted that an award of prejudgment interest is inappropriate when the defendant acted innocently and had no reason to know of the wrongfulness of his actions, *Wickham,* 955 F.2d at 834, citing *Board of County Commissioners of the County of Jackson v. United States,* 308 U.S. 343, 352-53, 60 S.Ct. 285, 289, (1939), and where there is a good faith dispute between the parties as to the existence of liability. *Wickham,* 955 F.2d at 834-35, citing *St. Louis & O'Fallon Ry. Co. v. United States,* 279 U.S. 461, 49 S.Ct. 384 (1929). In *Wickham,* on July 8, 1974, the defendant union picketed the plaintiff

electrical contractor who had entered into contracts with the City of New York and the Board of Education to construct three new public schools. *Wickham*, 955 F.2d at 832-33. Plaintiff's electrician employees already were being represented by another labor organization, the Teamsters. *Id.*, at 833. The Court found that the defendant union's "immediate goal of the strike was to force the Board of Education to cease doing business with Wickham. The ultimate goal of the strike was to oust the Teamsters from their position as representatives of the Plaintiff's employees." *Id.*

On July 22, 1974 the Board of Education issued stop work orders to all contractors who did not have collective bargaining agreements with the defendant union. *Id.* As a result, the Plaintiff's work on the schools stopped abruptly, and, on July 29, 1974, the Plaintiff filed a civil suit in federal court under Section 303(b) of the LMRA, as well as filed unfair labor practice charges with the NLRB. Even after the Board of Education rescinded the stop orders on August 6, 1974, the defendant union *continued* the walkout until September 13, 1974, when the United States District Court for the Eastern Division of New York issued a Temporary Restraining Order against the strike. *Id.* Subsequently, the NLRB found that the defendant union had engaged in an unfair labor practice under Section 8(b)(4) of the National Labor Relations Act ("NLRA" or "Act") and issued a cease and desist order, which the Second Circuit upheld. *id.* Meanwhile, in the civil suit, a jury found the defendant-union liable under Section 303 and the trial court awarded Plaintiff prejudgment interest, which the Second Circuit upheld. *Id.*

Unlike in *Wickham*, the parties have had a good faith dispute between them as to the existence of liability. It is undisputed that on or about June 23, 1992, the day before Local 150 picketed Haley Brothers, a non-union contractor, for recognition, Union Business Agent Benefield asked Haley to sign a contract at the Herscher jobsite (App. 38). When Haley refused, on June 24, 1992, Benefield began picketing Haley on the right-of-way and at the main entrance to Station 201 (Tr. 241, 270-71, 292-95, 300). At all times, it remained Local 150's position that it picketed Haley Brothers for recognition – a right guaranteed under Section 7 of the NLRA. *See*, 29 U.S.C. §157. Indeed, Local 150 can and did express its primary intent sentiments both to the primary employer as well as secondary or neutral employers. As the district court found in its Order "the Union's business agents told representatives of Natural Gas and Coolsaet that the picket lines would only come down if Haley Brothers was removed from the Herscher jobsite" (App. 54). Such efforts are protected activity under *NLRB v. Servette, Inc.*, 377 U.S. 46 (1964), and, more importantly, are consistent with the Union's belief that it was engaging in lawful, protected activity.

Furthermore, at no time did a federal court issue a TRO against the strike or otherwise find the strike improper, as happened in *Wickham*. Indeed, Coolsaet never filed an unfair labor practice charge with the NLRB during the 11 days of picketing, never petitioned the court for injunctive relief, nor did it file a grievance under the National Agreement. Moreover, once Local 150 stopped picketing Haley Brothers, the rank and file employees returned to work. On September 5, 1992, over

two months after the strike began, Coolsaet filed a 303 suit in federal court. Although Local 150 has been found liable, the record shows that Local 150 acted in accordance with the *Moore Dry Dock* standards, and unlike the outrageous and intentional conduct of the defendant-union in *Wickham*, here, Local 150 acted innocently.

Similarly, in *Beelman Truck Company*, the Seventh Circuit upheld an award of prejudgment interest where a defendant union, found liable of violating Section 303, picketed Plaintiff, a general contractor, for prevailing wages. *Beelman*, 33 F.3d at 888-89. There, the defendant-union picketed for several months, causing multiple work stoppages and job disruptions. *Id.* The Court found that the defendant union *ignored* the reserved gate which had been established. *Id.*, at 889. Additionally, after the Plaintiff filed an unfair labor practice charge with the NLRB alleging that the union picketed the jobsite to pressure secondary employers to succumb to the union's demands, the Board issued a temporary injunction against the union. *Id.* Despite such a finding, the picketing sporadically resumed at the reserved gate. *Id.* Here, once again, no determination was made during the picketing that Local 150's conduct violated the NLRA, or any other federal law. Moreover, unlike in *Beelman* where the Seventh Circuit noted "the evidence is essentially uncontroverted that Local 525 ignored the special gate . . . choosing instead to picket at the main entrance to the project," *Id.*, at 890, here, Coolsaet *never* established a reserved gate. Local 150 engaged in what it thought was legitimate, recognitional picketing against a non-union contractor for only eleven days, not several months. Also, Local 150's picket did not cause multiple work stoppages

and job disruptions. Instead, the work resumed without any further disruption by Local 150. Therefore, although the Court found Local 150's conduct to be violative of Section 303, no evidence exists to show that "the violation was *intentional*, and indeed *outrageous* (emphasis added)." *See, Gorenstein Enterprises*. Accordingly, affirming the district court's award of prejudgment interest was inappropriate.

Next, the award of prejudgment interest is further inappropriate because it results in over-compensation to Coolsaet. *Wickham Contracting v. Local Union No. 3, IBEW*, 955 F.2d 831 (2nd Cir. 1992). As the Seventh Circuit has explained, "prejudgment interest is a form of compensation and the decision to award prejudgment interest . . . requires a balancing of the equities between the parties under the circumstances of the particular case . . . (citations omitted)." *Michaels v. Michaels*, 767 F.2d 1185 (7th Cir. 1985).

Here, it was inequitable to assess over $100,000.00 in prejudgment interest on a damage claim of only $329,467.46. Moreover, most of the damages which the court awarded Coolsaet, were not actual damages suffered by Coolsaet or out-of-pocket expenses. For example, in Coolsaet's claim for "Equipment Costs during Strike," Coolsaet incurred no out-of-pocket equipment expenses while picketing idled the job. Coolsaet owned all its equipment at Hersher outright (Tr. 563-64). Hence, it did not pay the $68,651.00 claimed to anyone. The same argument can be made with the award of $70,812.00 for the two additional weeks of equipment costs. Coolsaet owned the equipment and the evidence is uncontroverted

that Coolsaet did not rent the equipment nor that Coolsaet could have used the equipment at another project. Accordingly, it is unfair for the lower court to have awarded prejudgment interest on a damage claim which is not based entirely on actual costs incurred by Coolsaet as a result of the picketing.

Moreover, prejudgment interest should not have been awarded because, as the Seventh Circuit previously has held, prejudgment interest is not available where damages themselves are speculative or at least uncertain. *Beelman Truck Co. v. Chauffeurs, Teamsters, Warehousemen and Helpers*, 33 F.3d 886, 892 (7th Cir. 1994). Coolsaet already has received a windfall in the form of a profit at least twice what Coolsaet itself considers to be a good one (Tr. 596, 598). Coolsaet based its damage claim upon the entirely speculative assertion that the two-week picketing caused it to incur a delay of nearly twice that. It calculated that delay in the most simplistic fashion by subtracting a so-called "tie-in" date (which itself was not a completion date) from a projected tie-in date. Yet, it could support only at most a few days' delay in terms of actual work which had to be redone (Tr. 481). Furthermore, the only neutral witness to testify concerning the impact of the strike upon the project was NGPL Inspector Filiatrault, who stated that "no single factor" caused the delay in the project and that there were several problems which probably delayed its completion (Filiatrault Dep. 127). Given the uncertain and contradictory nature of the so-called "delay" suffered by Coolsaet, the damages themselves were highly speculative and prejudgment interest on those damages was unwarranted.

Finally, the award of prejudgment interest should not have been compounded. Once again, as stated *supra*, since Local 150's conduct was neither intentional nor outrageous, it was contrary to established case law to have allowed the compounding of the interest, especially since Coolsaet never suffered any out-of-pocket expenses for the bulk of the damages found compensable by the court. Therefore, the lower court should not have affirmed Coolsaet's award of *any* prejudgment interest, or alternatively, the amount of prejudgment interest should have been reduced.

CONCLUSION

For all of the above-stated reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

for the Seventh Circuit

Nos. 98-2102, 98-2526

R.L. Coolsaet Construction Co.,

Plaintiff-Appellee, Cross-Appellant,

v.

Local 150, International Union of Operating Engineers,

Defendant-Appellant, Cross-Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
No. 92-2247 – **Joe Billy McDade,** *Chief Judge.*

Argued January 19, 1999 – Decided May 7, 1999.

Before Flaum, Ripple, and Diane P. Wood, *Circuit Judges.*

Flaum, *Circuit Judge.* This is an appeal from judgment in favor of a contractor claiming that a union engaged in improper secondary picketing in violation of federal law and breached the "no-strike" clause in the parties' collective bargaining agreement. The union claims that its activity was aimed only at a non-union contractor on the same project, and to the extent it affected the secondary contractor, it was protected as a sympathy strike implicitly allowed by the terms of their bargaining agreement. The union also challenges the district court's damages

award and the contractor cross appeals, claiming the court failed to include certain items in its calculation of prejudgment interest. We now affirm the district court's decisions regarding each of the union's claims, and reverse the court's calculation of damages.

Background[1]

This dispute stems from a picket line set up by Local 150 ("Local 150") of the International Union of Operating Engineers ("IUOE") in June 1992, at the National Gas Pipeline Company's ("NGPL's") gas storage facility in Herscher, Illinois. In 1991, NGPL hired R.L. Coolsaet Company ("Coolsaet"), a union contractor, to repair a pipeline running into NGPL's gas compressor at the Herscher facility. As a member of the Pipe Line Contractors Association ("PLCA"), a national trade group, Coolsaet was at all relevant times a signatory to a national collective bargaining agreement ("National Agreement") between the PLCA and the IUOE. Pursuant to this agreement, Coolsaet hired workers represented by Local 150, as well as workers represented by other craft unions, to perform the work at Herscher. Coolsaet worked in and around an 80-acre fenced-in area within the Herscher facility referred to as Station 201. In 1992, NGPL hired Haley Brothers, a local non-union contractor, to perform water pipe installation work in the fields surrounding Section 201. At no time prior to the strike, however, did

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[1] The following account is based on the district court's finding of facts pursuant to Fed.R.Civ.P. 52(a).

Coolsaet and Haley employees work in close proximity to each other.

On the morning of June 23, 1992, Local 150's steward, Roger Seale, and one of its business agents, Gary Benefield, met at Station 201 and drove three miles to an area called Saffer 3, where Haley was then working. There, Benefield told one of Haley's owners that its work should be performed by union labor and asked Haley to join Local 150. The owner refused. Soon after, John Filiatrault of NGPL arrived at Saffer 3 and told Benefield that Haley's work was a "separate job, separate contract, separate system," and that NGPL had the right to hire non-union contractors. Benefield responded that Haley's presence at Herscher could result in union picketing. That afternoon, Roger Seale repeated Benefield's warning to Coolsaet's office manager.

The same day, in an effort to avert a strike, NGPL scheduled a meeting with union representatives but called it off after concluding that the dispute was between Coolsaet and its unions, not between the union and NGPL. After the meeting was canceled, Benefield called other craft unions representing Coolsaet employees to inform them that Local 150 would likely begin picketing the following day, June 24, in front of Station 201.

Station 201 had three gates: the Main Gate, which was used by anyone with business at the site, Gate 2, which was locked during this period, and Gate 3, which was used exclusively by Coolsaet employees. On the morning of June 24, Benefield set up pickets in the area where Haley had been working the day before, and in front of the Main Gate, which Haley occasionally used to

retrieve supplies stored inside Station 201. Benefield also set up pickets in front of Gate 3, despite the union's knowledge that only Coolsaet employees used that gate. The picket line included some Coolsaet employees.

Because none of its union employees would cross the picket line, Coolsaet's operation was completely shut down from June 24 until July 7. On June 25, Michael Quigley, the Local 150 business agent in charge of the picketing activity, requested a meeting with NGPL and representatives from other unions to discuss his concern about Haley working at Herscher. NGPL's manager, David Nightengale, informed Quigley that Haley had removed all of its supplies from Station 201 that day and asked why Local 150 continued to picket at that location instead of where Haley was actually working. Quigley responded that the union had the right to picket wherever it would be most effective.

The pickets remained in place in front of Station 201 from approximately 7:00 a.m. to 4:00 p.m. each day even though Haley no longer used either gate and Local 150 business agents did not know whether Haley was working on the site during those hours. During this period, Quigley told Coolsaet's manager, Ryan Colonello, that as long as Haley was still on the job, the picketing would continue.

The National Agreement between the PLCA and IUOE contained a broad no-strike provision (Article IX(A)) which prohibited the union from engaging in any "strike slowdown, stoppage of work or any interference . . . with the progress of the work" and prevented the employer from ordering any lockout of union

workers. On July 25, 1992, Hailey Roberts, the director of the PLCA, faxed a letter to Frank Hanley, president of the IUOE, informing him that Local 150 had set up a picket line at Herscher in violation of the no-strike clause in the National Agreement. On July 30, Howard Evans of the IUOE faxed Roberts' letter to Bill Dugan, president of Local 150, along with a cover note stating: "I am sure you are aware that Article [IX] of the National Pipeline Agreement contains a no strike clause." On July 2, Local 150 treasurer Joe Ward told Evans that "the picket line would be down on Monday [July 6]." When the strike continued on July 6, Evans faxed another letter ordering the removal of the picket line, which came down on July 7, 1992.

In September 1992, Coolsaet sued Local 150 for damages resulting from what it alleged was an illegal secondary picket in violation of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(b)(4), and the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 185 and 187. Coolsaet also claimed that Local 150 breached the no-strike clause of the National Agreement.

Following a four day bench trial, the court determined that because Local 150 had intended to exert pressure on Coolsaet and NGPL, neutral or secondary employers, in an effort to remove Haley from the Herscher site, the union violated Section 8(b)(4) of the NLRA. Additionally, the court held that Local 150 breached the no-strike clause of the National Agreement. Based on the delay and increased cost Coolsaet incurred as a result of the strike, the court initially awarded the contractor $329,467 in damages. After additional briefing by the

parties, the court awarded Coolsaet $105,221 in compounded prejudgment interest based on all of the contractor's damages except those associated with equipment expenses on machines owned by Coolsaet.

Local 150 now appeals, claiming that it did not engage in any illegal secondary activity nor did it violate the National Agreement. The union also challenges the court's damages and interest calculations. Coolsaet cross-appeals, claiming that the interest award improperly excluded equipment expenses and should have been higher.

Discussion

In reviewing the trial court's decision, we examine any legal conclusions de novo, *Orix Credit Alliance v. Taylor Mach. Works, Inc.*, 125 F.3d 468, 474 (7th Cir. 1997), but adopt its factual findings unless clearly erroneous. *Air Line Pilots Ass'n, Int'l v. United Air Lines, Inc.*, 802 F.2d 886, 891 (7th Cir. 1986); FED. R. CIV. P. 52(a). A finding of fact is clearly erroneous only when "the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573 (1985). The court's award of damages or prejudgment interest is reviewed for abuse of discretion. *Treat Bros. Co. v. Fidelity and Deposit Co.*, 986 F.2d 1110, 1121 (7th Cir. 1993). An abuse of discretion exists where the district court has made a manifest error of law, but this court does not second-guess the exercise of discretion that falls within the range of reasonable options. *See American Nat'l Bank & Trust Co. v. Regional Transp. Auth.*, 125 F.3d 420, 431 (7th Cir. 1997). With these

standards in mind, we examine each of the claims raised on appeal.

Unlawful Secondary Boycott

Section 303 of the LMRA provides a private cause of action for a party injured by union conduct defined as an unfair labor practice under Section 8 of the NLRA. 29 U.S.C. § 187. Section 8(b)(4), in turn, defines picketing as an unfair labor practice if "any object of that activity is to exert improper influence on secondary or neutral parties." *International Union of Operating Engineers, Local 150, AFL-CIO v. NLRB*, 47 F.3d 218, 223 (7th Cir. 1995). As this court has explained:

> Where a union has a grievance with the terms and conditions of employment of a certain employer, (the "primary" employer), it must focus its picketing activity on that employer. The union may not exert pressure on an unrelated, "secondary" [or neutral] employer in order to coerce the secondary employer to cease dealing with the primary employer, thereby advancing the union's goals indirectly.

Mautz & Oren, Inc. v. Teamsters, Chauffeurs, and Helpers Union, Local No. 279, 882 F.2d 1117, 1120 (7th Cir. 1989). Section 8(b)(4)'s prohibition covers situations where the union acts with mixed motives: "It is not necessary to find that the sole object of the strike was secondary so long as one of the union's objectives was to influence the secondary employer to bring pressure to bear on the primary." *Id.* at 1121 (internal citations omitted); *see also BE&K Construction Co. v. Will & Grundy Counties Building Trades Council, AFL-CIO*, 156 F.3d 756, 761 (7th Cir. 1998).

The union's motive is a question of fact to be determined by an examination of the "totality of [the] union's conduct in [a] given situation." *International Union of Operating Engineers*, 47 F.3d at 223.

The analysis of secondary activity is more complicated where the primary and secondary employers share a common work site. *Id.* at 762. In that situation, because it is difficult or impossible to target the primary employer without having a substantial effect on a secondary employer, Section 8(b)(4) has been interpreted to allow some foreseeable secondary impact so long as the union does not intend to enmesh the secondary employer in the dispute. *See Mautz & Oren*, 882 F.2d at 1121. Claims of secondary picketing at a common work site are analyzed under an evidentiary framework known as the *Moore Dry Dock* standards. *See Sailor's Union of the Pacific (Moore Dry Dock)*, 92 N.L.R.B. 547, 549 (1950). Under these standards, a union's picketing is presumed to be lawful primary activity if (1) it is strictly limited to times when the situs of the dispute is located on the secondary employer's premises; (2) at the time of the picketing the primary employer is engaged in its normal business at the situs; (3) the picketing is limited to places reasonably close to the location of the situs; and (4) the picketing discloses clearly that the dispute is with the primary employer. *International Union of Operating Engineers*, 47 F.3d at 223. However, *Moore Dry Dock* only sets up a presumption which is rebutted by evidence of an unlawful intent. *Id.* Therefore, whether *Moore Dry Dock* is used to examine union conduct or not, the question remains a factual inquiry into the union's actual state of mind. *Id.*

The district court doubted whether *Moore Dry Dock* applied to this case because Haley's and Coolsaet's operations were more than a mile apart and thus the Herscher facility did not constitute a single work site. Even so, the court indicated that the *Moore Dry Dock* standards had not been met, particularly the limitations on the time and place of picketing. Ultimately, however, the court held that *Moore Dry Dock* was irrelevant because it found by a preponderance of the evidence that Local 150 intended to pressure secondary employers Coolsaet and NGPL in its effort to rid the Herscher facility of Haley. Essentially, the court concluded that one of the purposes of Local 150's picket line was to disrupt Coolsaet's operation by keeping its union employees from crossing it. This in turn would induce NGPL to either force Haley into joining the union or to kick the contractor off the premises in order to resume work.

The court based its conclusion on a number of factual findings: Local 150 set up pickets in front of Gate 3 despite its knowledge that only Coolsaet employees used that gate; the union used Coolsaet employees on its picket line; the continued picketing of Station 201 after Haley no longer stored material there; the union's maintenance of the picket line without regard to whether Haley was on the site or not; the union's failure to target Haley with its pickets and focus instead on areas where it knew Coolsaet was working; and, finally, the statements by Local 150 business agents made to representatives of Coolsaet and NGPL that the pickets would only come down if Haley was removed. Based on these findings, the court held that the union was "overtly exerting improper

pressure on neutral employers [Coolsaet and NGPL]" in violation of Section 8(b)(4).

Local 150 now argues that the court's legal conclusions were not supported by the facts and that many of the court's key factual findings were incorrect. The union suggests that the court misinterpreted Local 150's actions and failed to credit certain testimony which contradicted the court's factual findings. Essentially, the union counters each key fact with its own version of events, reiterating what it argued before the district court.

However, the union has failed to overcome the considerable burden it bears in attempting to refute the district court's factual findings. *See Air Line Pilots Ass'n, Int'l v. United Air Lines, Inc.*, 802 F.2d 886, 891 (7th Cir. 1986). In challenging these findings, the union relies primarily on the testimony of its own representatives Benefield and Seale. Yet, the trial court specifically discredited these witnesses on key factual issues because their testimony was "vague, selective and, therefore, lacked credibility." When findings of fact are based on determinations regarding the credibility of witnesses, our review is particularly deferential: "only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 575 (1985). Without objective evidence to the contrary, the court's credibility rulings are extremely difficult to overturn. *Rumsavich v. Borislow*, 154 F.3d 700, 703 (7th Cir. 1998); *In re Generes*, 69 F.3d 821, 825 (7th Cir. 1995); *Dunning v. Simmons Airlines Inc.*, 62 F.3d 863, 868 (7th Cir. 1995). Because we consider the court's findings to be well supported by the record,

and because the union has failed to present any objective evidence to the contrary, we will not disturb them.

Given these factual findings, we also agree with the court's legal conclusion that Local 150 engaged in improper secondary activity. Even if this case is analyzed under *Moore Dry Dock*,[2] the court reasonably concluded that at least one of the union's objectives was to pressure Coolsaet and NGPL into forcing Haley off the Herscher site. The court's finding that Benefield and Quigley maintained the pickets at Station 201 without regard to where or when Haley was working supports the court's conclusion that Local 150 had failed to satisfy two of *Moore Dry Dock's* standards: that picketing be limited to the times and places the primary employer worked. This failure sets up a presumption of secondary intent which Local 150 has not rebutted. *International Union of Operating Engineers, Local 150, AFL-CIO*, 47 F.3d 218, 223 (7th Cir. 1995). Moreover, we are satisfied that, in addition to its failure to narrowly target Haley's operations, the use of Coolsaet's employees on the picket line as well as the statements to Coolsaet and NGPL that the pickets would remain until Haley was removed from Herscher all

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[2] Although the court did not hold that *Moore Dry Dock* applied to this case, it nonetheless concluded that under its standards Local 150's conduct was not legal. While we share the court's skepticism that the Herscher facility is a single work site triggering *Moore Dry Dock*, because the court found actual evidence of an intent to exert secondary pressure we need not decide this question. *See Mautz & Oren, Inc. v. Teamsters, Chauffeurs, and Helpers Union, Local No. 279*, 882 F.2d 1117, 1121 (7th Cir. 1989) ("The question throughout remains a factual inquiry into the union's actual state of mind under the totality of the circumstances.").

strongly support the notion that at least one of Local 150's purposes was to exert secondary pressure. *Id.*

The union argues that the statements it made to Coolsaet and NGPL were protected by the Supreme Court's decision in *NLRB v. Servette*, 377 U.S. 46 (1964), which held that non-threatening statements concerning protected activity do not violate Section 8(b)(4). This argument is unavailing. In *Servette*, the Court held that a union could ask managers of a secondary employer not to handle goods of the primary employer. *Id.* at 51. The court specifically noted that the union was not "attempting to induce or encourage them to cease performing managerial duties in order to force their employers to cease doing business with [the primary employer]." *Id.* Here, however, the court interpreted Local 150's statements to be just that – an attempt to induce or encourage Coolsaet and NGPL to cease doing business with Haley. Because we believe the court did not err in interpreting these statements as it did, they are not protected by the holding in *Servette*. *See BE&K Construction Co. v. Will & Grundy Counties Building and Trades Council*, 156 F.3d 756, 769 (7th Cir. 1998) ("[T]he union cannot avoid liability for illegally threatening a secondary employer by conveying the threat with innocuous words, implications and body language."); *Pickens-Bond Const. Co. v. United Brotherhood of Carpenters*, 586 F.2d 1234, 1240 (8th Cir. 1978) ("Selection of permissible inferences raised by evidence is primarily a function of the trial court and findings thus will stand unless clearly erroneous.").

While the line between permissible primary activity and unlawful secondary activity may be "more nice than

obvious," Local 761, *Elec. Workers v. NLRB*, 366 U.S. 667, 674 (1961), Local 150 clearly crossed it at Herscher.

Breach of the National Agreement

The union next argues that it did not breach the National Agreement because Coolsaet failed to exhaust contractual remedies and because the Agreement's no-strike provision did not cover the kind of picketing at issue.

The trial court concluded that although Article IX(A)[3] of the National Agreement states that all disputes concerning the Agreement were to be arbitrated, Article IX(B) allows either party to opt out of the arbitration clause and go directly to court if the dispute involves a union strike or an employer lock-out. Article IX(B) provides in relevant part:

> If the local union . . . causes or promotes a strike, slowdown, work stoppage or any interference with the operation or progress of the work . . . then the Employer . . . may at its option declare the provisions of [the arbitration clause] inoperative and seek whatever remedy may be available from the National Labor Relations Board or any Federal or State court having jurisdiction over the matter.

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[3] Article IX(A) provides:

> All grievances, disputes, differences of opinion and other questions concerning this Agreement shall be settled in accordance with the procedures for settlement of grievances and disputes set out in [Article X, the arbitration clause] below.

The trial court decided that because Coolsaet chose to pursue its remedy in federal court, it had triggered Article IX(B) and did not need to arbitrate the dispute.[4]

Local 150 now argues that Coolsaet never actually "declared" that the arbitration clause was inoperative, so it is still in effect and the employer is still bound by its requirements. We reject this formalistic assertion. Article IX(B) does not appear to require any specific declaration language and none should be inferred. It is hard to imagine a clearer declaration that the arbitration clause is inoperative than the filing of this suit. Article IX(B) clearly allows an employer to by-pass the arbitration requirement if the dispute involves a work stoppage. Although parties to a collective bargaining agreement must normally exhaust contractual arbitration before pursuing other remedies, *see Mautz & Oren*, 882 F.2d at 1126-27, they need not do so if the agreement does not require arbitration over the dispute at issue. *Cf. Drake Bakeries, Inc. v. Local 150*, 370 U.S. 254, 257-60 (1962) (holding that because parties had failed to carve out the issue in question from the arbitration clause, it needed to be arbitrated).

Local 150 also argues that despite the no-strike clause, it still had a right to sympathy strike[5] because the

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[4] Section 301 of the LMRA confers federal jurisdiction over claims for breach of collective bargaining agreements. *See* 29 U.S.C. § 185.

[5] As the term is used in this case, a sympathy strike is essentially the refusal of union members to cross a picket line when they are not themselves the subject of the dispute. *See Gary Hobart Water Corp. v. NLRB*, 511 F.2d 284, 287 (7th Cir.

National Agreement did not specifically prohibit it. Relying on our decision in *Indianapolis Power and Light v. NLRB*, 898 F.2d 524 (7th Cir. 1990), the union argues that without extrinsic evidence of an intention to waive sympathy strikes, it may still engage in them.

However, whether we apply the rule stated in *Indianapolis Power* or not,[6] the language of the National

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1975). It is recognitional in nature and generally considered protected by Section 7 of the NLRA, 29 U.S.C. § 157. The right to sympathy strike may, like other strike rights, be waived by clear and unmistakable contractual language. *See NLRB v. Wisconsin Aluminum Foundry Co.*, 440 F.2d 393, 399 (7th Cir. 1971).

[6] We recognize that the rule stated in *Indianapolis Power* is not necessarily the law of this circuit. Our decision in that case was the result of its unusual procedural posture. The Court of Appeals for the D.C. Circuit had announced the rule (that in the absence of extrinsic evidence, no strike clauses do not automatically include sympathy strikes) prior to remanding the case. *Indianapolis Power*, 898 F.2d at 526. On a subsequent appeal the case was transferred to this court. *Id.* In holding that the rule announced by the D.C. Circuit would be considered the law of the case and applicable to the parties in the suit, we said that "far from being clearly erroneous, we believe that the [rule] is reasonable and consistent with the [NLRA] . . . [It] reasonably accommodates the two important policies: that a waiver of statutory rights is not to be lightly inferred, and that parties should be free to bargain and enter into an agreement reflecting their bargains." *Id.* at 529. Because sympathy strikes are analytically distinct from traditional strikes, *see Gary Hobart Water Corp. v. NLRB*, 511 F.2d 284, 287 (7th Cir. 1975), we see no reason to assume that a no strike clause automatically includes them. Yet the question of whether *Indianapolis Power* controls this case is not squarely before us, and because we believe the language and history of the National Agreement clearly forbid this kind of work stoppage, we need not address the issue further here.

Agreement, as well as certain extrinsic evidence, convince us that the parties intended the kind of strike at issue to be included in the no strike clause. First, the no-strike clause is accompanied by a specific sympathy strike exception which does not cover Local 150's actions at Herscher. That exception provides:

> It shall not be a violation of this Agreement or of the no-strike clause if members of the International Union of Operating Engineers refuse to cross a picket line established by another craft union within the pipe line industry.

Article IX(D). This exception for certain sympathy strikes – those in observance of other unions' picket lines – strongly implies that sympathy strikes in general were included in the no-strike clause, for if they were not, there would be no need for an exception. The fact that sympathy strikes in favor of Local 150's own picket lines are not included in the specific exception similarly indicates that the union's actions here fell "within the purview of the no-strike clause." *Indianapolis Power*, 898 F.2d at 528; *see also Plumbers and Steamfitters Local 150 v. Vertex Const. Co.*, 932 F.2d 1443, 1449 (11th Cir. 1991) ("The doctrine of expressio unius est exclusio alterius instructs that when certain matters are mentioned in a contract, other similar matters not mentioned were intended to be excluded."); *see also Smart v. Gillette Co. Long-Term Disability Plan*, 70 F.3d 173, 179 (1st Cir. 1995) ("While this interpretive maxim [expressio unius] is not always dispositive, it carries weight."). Additionally, based on the history of negotiations between the PLCA and the IUOE, the court concluded that "the no-strike clause in the National Agreement represents a fifteen year drafting

effort by the parties to the agreement to eliminate work stoppages caused by recognitional picketing." More specifically, a Coolsaet witness testified that the no strike clause was added to the Agreement in response to the activity of Local 2 of the IUOE, which had engaged in strikes similar to the one at issue here. Thus, both the structure of the National Agreement, with its specific sympathy strike exception, and its bargaining history clearly point to the conclusion that Local 150's activities fall within the prohibition of the no strike clause. *See Inland Steel Co. v. NLRB*, 719 F.2d 205, 207 (7th Cir. 1983); *Amcar Div., ACF Industries v. NLRB*, 641 F.2d 561, 567 (8th Cir. 1981); *cf. Indianapolis Power*, 898 F.2d at 530 (evidence that parties "agreed to disagree" about whether certain strikes were covered by the no-strike clause held not sufficient to waive the right to engage in those strikes). We therefore see no error in the district court's conclusion that the union breached the National Agreement.

Damages and Interest

Local 150 next argues that even if it engaged in improper secondary activity at Herscher, the court erred in awarding Coolsaet damages, or alternatively, that its damage award was excessive. In either case, claims Local 150, the court erred in awarding pre-judgment interest.

Damages

The trial court awarded Coolsaet damages based on what the court found to be a twelve day delay (in addition to the eleven days of the strike itself) in completion of the project which was directly attributable to the

strike.[7] This post-strike delay resulted from work that had to be redone and lost time and efficiencies re-mobilizing the project. The damages figure includes increased payroll and equipment expenses as well as other miscellaneous expenses associated with the strike-induced delay.

Local 150 now claims that the award should be reversed because the damages calculation was purely speculative. *See Mid-America Tablewares v. Mogi Trading Co.*, 100 F.3d 1353, 1367-69 (7th Cir. 1996). This argument is essentially another challenge to the court's factual findings. Yet the union fails to show how any are clearly erroneous. On the contrary, the court reasonably calculated a delay of twelve days based on an estimated completion date made just prior to the strike and comparing it to the actual completion date. The evidence also supports the court's finding that work needed to be redone after the strike and that Coolsaet experienced serious problems re-mobilizing its workforce. Both of these delay factors are directly attributable to the strike and the expenses associated with them are compensable. *American Bridge Division, U.S. Steel Corp. v. International Union of Operating Engineers, Local 487*, 772 F.2d 1547, 1552 (11th Cir. 1985) (increased costs associated with 50% reduction in efficiency attributable to illegal strike recoverable); *John V. Cruz Co. v. United Brotherhood of Carpenters & Joiners*, 907 F.2d 1228, 1232 (1st Cir. 1990) (holding damages recoverable under Section 303 of NLRA, 29 U.S.C.

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[7] The court essentially arrived at the twelve day figure by comparing – with certain adjustments – the pre-strike estimated completion or "tie-in" date with the actual "tie-in" date.

§ 187, for harm done by illegal secondary boycott). The actual cost figures applied to the delay are not disputed by the union. That the exact amount of loss suffered by Coolsaet cannot be determined with absolute certainty does not bar recovery: "While the employer must prove that he has sustained some injury to his business or property, he need not detail the exact amount of damages suffered. It is sufficient if the evidence supports a just and reasonable approximation." *Refrigeration Contractors, Inc. v. Local Union No. 211*, 501 F.2d 668, 671 (5th Cir. 1972); *see Zazu Designs v. L'Oreals, S.A.*, 979 F.2d 499, 505-06 (7th Cir. 1992) (compensatory damages must rest on just and reasonable estimate based on relevant data).

Next, relying on a decision from the Ninth Circuit, *Matson Plastering Company, Inc. v. Plasterers & Shophands Local 66*, the union claims that the court erred in awarding damages based on equipment expenses because only "out of pocket expenses paid to third parties as a result of picketing" are compensable under Section 303. 852 F.2d 1200, 1203 (9th Cir. 1988). Their argument is that Coolsaet owned all its own equipment and thus it should not be compensated for equipment expenses because they were not out-of-pocket and not paid to third parties.[8] Nothing

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[8] Local 150 also argues that the court failed to deduct the damage to Coolsaet attributable to lawful primary conduct from unlawful secondary activity. *See Boxhorn's Big Muskego Gun Club, Inc. v. Electrical Workers Local 494*, 798 F.2d 1016 (7th Cir. 1986). The district court rejected this contention by noting that the union had failed to even suggest how any of Coolsaet's requested damages resulted from Local 150's picketing of Haley alone and not from the picketing at Station 201, which the court held was entirely tainted with secondary intent. We see no error in the court's reasoning.

in *Matson*, however, supports this constrained approach to damages. On the contrary, that court discussed lost profits – something neither out of pocket nor paid to third parties – as a recoverable item under the NLRA. *Id.* at 1202 (citing *Frito-Lay, Inc. v. Local 137, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers*, 623 F.2d 1354, 1363 (9th Cir. 1980). As other courts have recognized, idle equipment (or equipment which must remain on a job site because the project is delayed) is a real and quantifiable loss to the contractor, whether rent is paid to another or charged to the contractor himself as an accounting expense,[9] and it is recoverable. *American Bridge Division, U.S. Steel Corp. v. International Union of Operating Engineers, Local 487*, 772 F.2d 1547, 1553 (11th Cir. 1985); *Frito-Lay, Inc.*, 623 F.2d at 1364; *Metropolitan Paving Co. v. International Union of Operating Engineers*, 439 F.2d 300, 305 (10th Cir. 1971). The trial court did not abuse its discretion by including these expenses in its calculation of damages.

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[9] Contractors must charge themselves rent on equipment they own. This rent essentially accounts for the depreciation (the real decline in the value of the equipment) as well as finance costs, insurance and certain taxes. As the equipment sits idle, these expenses accumulate without generating any offsetting revenue. Even if the equipment is owned by the contractor free and clear of finance charges, keeping the equipment on a project longer than expected without a corresponding increase in revenue entails opportunity costs. *See Frito-Lay, Inc.*, 623 F.2d at 1364.

Interest

After requesting additional briefing, the trial court decided to award Coolsaet an additional $105,221, which represents the compounded interest on Coolsaet's total damage award except for the amount awarded for equipment costs. *Beelman Truck Company v. Chauffeurs, Teamsters, Warehousemen and Helpers*, 33 F.3d 886, 892 (7th Cir. 1994) (award of interest under the LMRA is at discretion of the trial court). The union now challenges that decision.

Initially, Local 150 argues that Coolsaet's request for interest, which is normally treated as a Rule 59(e) motion, was untimely because it was filed more than ten days after the court entered its judgment. FED. R. CIV. P. 59(e); *see McNabola v. Chicago Transit Authority*, 10 F.3d 501, 520 (7th Cir. 1993) (court lacks jurisdiction to hear untimely requests for interest). Yet as the court explained, Coolsaet requested interest well before judgment was rendered. After awarding Coolsaet damages, the court requested an additional brief from Coolsaet in support of the interest award. Although this brief was filed more than ten days after the judgment, because Coolsaet's initial request is treated as a Rule 59(e) motion, it was timely. *See John Hancock Healthplan of Penn. v. Lexington Ins. Co.*, 1991 WL 63854 (E.D. Pa. 1991); *Dunn v. Truck World Inc.*, 929 F.2d 311 (7th Cir. 1991); *Jurgens v. McKasy*, 905 F.2d 382 (Fed.Cir. 1990); *Protective Life Insurance Casualty Corp. v. Safety Nat. Casualty Corp.*, 19 F.3d 28 (9th Cir. 1994).

Next, the union claims that because their actions were not intentional or outrageous and because the underlying damages were speculative, prejudgment

interest was inappropriate. *See Gorenstein Enterprises v. Quality Care-USA*, 874 F.2d 431, 436 (7th Cir. 1989). We are not convinced. While prejudgment interest may be inappropriate where the defendant had no reason to know of the wrongfulness of its actions, *see Wickham Contracting Co. v. Local No. 3, International Brotherhood of Electrical Workers*, 955 F.2d 831, 833-34 (2nd Cir. 1992), that is not the case here. Indeed, a violation of Section 8(b)(4) requires, and the district court found, an unlawful intent. *See Mautz & Oren, Inc. v. Teamsters Local 279*, 882 F.2d 1117, 1120-21 (7th Cir. 1989). Nor is the fact that the damages award could not be calculated with absolute precision a bar to prejudgment interest. *See Wickham*, 955 F.2d at 836. As noted above, the court's damages award was well supported by the record, and awarding prejudgment interest was appropriate. *P.A. Bergner & Co. v. Bank One*, 140 F.3d 1111, 1123 (7th Cir. 1998) ("[P]rejudgment interest should not be thought of as a windfall in any event; it is simply an ingredient of full compensation that corrects judgments for the time value of money.").

Cross-Claim for Interest

Before calculating the amount of prejudgment interest, the district court subtracted from the total damages amount the sum designated as Coolsaet's equipment expenses. Apparently, the trial court concluded that because Coolsaet owned its equipment this money was not "out-of-pocket" and could not have been invested, so it would not have earned any interest. Coolsaet maintains, however, that this decision deprived it of complete compensation and the interest award should be increased. We agree. Prejudgment interest is based on the

notion that a plaintiff is not fully compensated unless it receives interest for the time it was deprived the use of its money. *See Partington v. Broyhill Furn. Indus. Inc.*, 999 F.2d 269, 274 (7th Cir. 1993). This court has explained that:

> Money today is not a full substitute for the same sum that should have been paid years ago. Prejudgment interest therefore is an ordinary part of any award under federal law. By committing a tort, the wrongdoer creates an involuntary creditor. It may take time for the victim to obtain an enforceable judgment, but once there is a judgment the obligation is dated as of the time of the injury. . . . Prejudgment interest at the market rate puts both parties in the position they would have occupied had compensation been paid promptly.

In re Oil Spill by Amoco Cadiz, 954 F.2d 1279, 1331 (7th Cir. 1992); *see also NLRB v. International Measurement and Control Company*, 978 F.2d 334, 336 (7th Cir. 1992). As discussed above, the equipment expenses at issue represent actual, compensable losses to the contractor. *American Bridge Division, U.S. Steel Corp. v. International Union of Operating Engineers, Local 487*, 772 F.2d 1547, 1553 (11th Cir. 1985); *Frito-Lay, Inc.*, 623 F.2d at 1364; *Metropolitan Paving Co. v. International Union of Operating Engineers*, 439 F.2d 300, 305 (10th Cir. 1971). Had Coolsaet been compensated for its equipment loss when it occurred, it could have put that money to productive use. *In re Oil Spill by Amoco Cadiz*, 954 F.2d at 1331. For the purpose of prejudgment interest, we see no reason, nor find any in the case law, for treating the damages items awarded to

Coolsaet differently. We therefore conclude that the contractor is entitled to interest on the entire amount.[10]

Rule 38 Sanctions

After briefs were submitted on this appeal, Coolsaet moved for damages and costs pursuant to Rule 38 of the Federal Rules of Appellate Procedure. Rule 38 states: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." In *Spiegel v. Continental Illinois Bank*, 790 F.2d 638 (7th Cir. 1986), we stated, "an appeal is frivolous when the result is obvious or when the appellant's argument is wholly without merit." *Id.* at 650 (citations omitted). Coolsaet argues that because the bulk of Local 150's argument on appeal depended on this court overturning the district court's credibility determinations, the union had no chance of prevailing. *See District 8, International Association of Machinists & Aerospace Workers, AFL-CIO v. Clearing, A Division of U.S. Industries, Inc.*, 807 F.2d 618, 623 (7th Cir. 1986) (appeal based solely on assertion that district court should have credited appellant's witnesses rather than appellee's was frivolous and justified Rule 38 sanctions); *Rennie v. Dalton*, 3 F.3d 1100, 1110 (7th Cir. 1993) (same). Although Local 150

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[10] Our conclusion might have been different if, for example, the court had concluded that the equipment expenses were far more speculative than the other expenses or were otherwise suspect. *See Wickham Contracting v. Local No. 3, International Brotherhood of Electrical Workers*, 955 F.2d 831, 833-4 (7th Cir. 1992). But the court's decision to exclude them from the interest calculation appears to be based only on the notion that they are not out-of-pocket expenses.

failed to provide us with a basis for overturning the district court's decision, we do not believe the appeal was frivolous. Local 150 raised substantial, if non-meritorious, legal challenges to the district court's finding of secondary activity, its interpretation of the no-strike clause and its calculation of damages. *Hal Commodity Cycles Management Co. v. Kirsh*, 825 F.2d 1136, 1139 (7th Cir. 1987). Because the union's arguments created some plausible chance of reversal on each of these grounds, *see Borowski v. DePuy, Inc.*, 876 F.2d 1339, 1341 (7th Cir. 1989), we do not consider this is an appropriate case for sanctions. *See id.* Therefore, Coolsaet's motion is denied and each party shall bear its own costs.

Conclusion

We agree with the district court's decision that Local 150 engaged in illegal secondary activity and breached the no-strike clause in the collective bargaining agreement it had with Coolsaet. We also agree with all but one of the district court's damages determinations. Therefore, we AFFIRM in part, REVERSE in part and REMAND for recalculation of prejudgment interest.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

R.L. COOLSAET CONSTRUCTION CO.,	)	
Plaintiff,	)	Case No. 92-2247
v.	)	
LOCAL 150, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, *et al.*,	)	
Defendant.	)	

ORDER

(Filed Nov. 21, 1997)

Five years ago,[1] on September 5, 1992, Plaintiff, R.L. Coolsaet Construction Company, filed a Complaint

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[1] While we all are aware of the old tried yet true cliche that "Justice Delayed is justice denied," *Drobny v. IRS*, 113 F.3d 670, 681 (7th Cir. 1997), and that the Court is held accountable for delay in its own docket, counsel for both litigants must acknowledge and accept their role in prolonging the ultimate resolution of this action. Indeed, the fact that the parties stood by as this case sat dormant from March 6, 1995, until March 11, 1996, is inexcusable. (*See also* Doc. #6, "Plaintiff's Motion to Extend Discovery;" Doc. #7, "Plaintiff's Motion to Extend Discovery;" Doc. #8, "Plaintiff's Motion to Extend Discovery;" Doc. #15, "Joint Motion to Extend Time;" Doc. #17, "Joint Motion to Extend Time;" Doc. #18, "Joint Motion to Extend Time;" Doc. #19, "Plaintiff's Motion to Extend Time;" Doc. #27, "Joint Motion to Extend Time;" Doc. #28, "Plaintiff's Motion to Extend Time;" Doc. #29, "Joint Motion To Extend Time;" Doc. #52, "Plaintiff's Motion to Extend Time;" Doc. #63, "Plaintiff's

against Defendants, Local 150, International Union of Operating Engineers, William E. Dugan, Michael J. Quigley, John Doe and Jane Doe.[2] (Doc. #1). The Court will briefly set forth the relevant background below.

This dispute arises out of contracts in which Natural Gas Pipeline Company of America ("Natural Gas") employed both union and non-union contractors to work on a gas and water line project in Herscher, Illinois. Natural Gas hired Plaintiff, R.L. Coolsaet Construction Company ("Coolsaet"), to repair and upgrade an underground natural gas pipeline. Coolsaet was unionized and recognized Defendant, Local 150, as the representative of its employees.[3] A collective bargaining agreement existed between Coolsaet and Local 150 at all times relevant to this dispute.

Natural Gas Company also hired Haley Brothers Excavating Inc. ("Haley Brothers"), a non-unionized contractor, to perform work on a water line project at the Herscher jobsite. Thereafter, Local 150 initiated a picket line to protest the non-unionized contractor. The picket line was in place from June 24, 1992, through July 7, 1992. The unionized Coolsaet employees refused to cross the

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Motion to Continue Hearing;" Doc. #64, "Defendants' Motion to Extend Time;" Doc. #65, "Plaintiff's Motion to Continue Trial;" Doc. #67, "Defendants' Motion to Extend Time;" and Doc. #68, "Defendants' Motion to Extend Time.").

[2] On February 22, 1995, the parties agreed to dismiss William E. Dugan, Michael J. Quigley, John Doe, and Jane Doe as Defendants in this action. (Doc. #43).

[3] The International Union of Operating Engineers ("IOUE") is the parent body of Local 150.

picket lines at the Herscher jobsite. As a result, the Coolsaet gas line repair project came to a halt.

Plaintiff's Complaint is in five counts. (Doc. #1). In Counts One, Two, Three, and Four, Plaintiff alleges that Defendants engaged in unlawful secondary boycott in violation of the National Labor Relations Act ("NLRA"), 29. U.S.C. § 158 (b) (4), and the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 185 and 187. Count Five alleges that Defendants breached a no-strike clause contained within the collective bargaining agreement. On September 28, 1992, Defendants filed an Answer to Plaintiff's Complaint as well as Affirmative Defenses. (Doc. #3)

Initially, Magistrate Judge Kauffman directed the parties to complete discovery by May 28, 1993. Nevertheless, the discovery deadline was extended to March 1, 1994. Thereafter, both parties filed motions for summary judgment. However, the motions were not fully briefed and ready for disposition until August 8, 1994. (*See* Docs. #21, 22, 23, 24, 25, 26, 30, 31, 33, 34, 35 and 36) On September 19, 1994, in a sparse three page Order, Judge Harold A. Baker denied both motions for summary judgment. (Doc. #41) In relevant part, Judge Baker stated:

> NLRA Unfair Labor Practice of Interfering with Neutral Employer
>
> Plaintiff Coolsaet claims that the objective of defendant union's strike was for Coolsaet employees to stop working so as to delay completion of the Natural Gas project in order to pressure Natural Gas to replace Haley Brothers with a Union contractor. The Labor Management Relations provisions of the NLRA permit

civil suits by those harmed by unfair labor practices, including secondary pressure on neutral employers. 29 U.S.C. § 158(b)(4). There are myriad cases interpreting these statutory provisions. Parties have cited many on both sides. However, both parties agree that the predominant case is *Moore Dry Dock. Sailor's Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547 (1950).

Moore Dry Dock sets guidelines for common situs picketing: a) The picketing must be strictly limited to times when the primary employer is at the site; b) At the time of the picketing, the primary employer must be engaged in its normal business at the site; c) The picketing must be limited to the places reasonably close to the location of the site; and d) The picketing must discloses [sic] that the dispute is with the primary employer.

The *Moore Dry Dock* standards involve a number of factual issues that preclude summary judgment. For example, there is genuine dispute between the parties as to whether Coolsaet employees used a reserved gate. This and numerous other factual questions must be decided before the court can apply the statutory law.

No-Strike Clause in the Collective Bargaining Agreement

Coolsaet and Local 150 had a collective bargaining agreement. One of the provisions stated that the union would not strike. The question is, did Local 150's strike against Haley, and the resulting disruption of Coolsaet employees, constitute a breach of the no-strike contract provision. If Local 150 did breach the contract, should the court treat it as a standard breach action, or

> should it be seen as subject to the arbitration provision of the contract.
>
> This contractual issue will be better decided in the statutory context of whether the strike involved unfair labor practices, and illegal impact on neutral parties.

(Doc. #41 at p. 2-3) (errors in original).

Two years after Judge Baker denied the motions for summary judgment, an Amended Pre-Trial Order was filed (Doc. #50, 9/30/96), and on September 27, 1996, Chief Judge Michael M. Mihm reassigned the instant action to this Court. (Doc. #48). A four-day bench trial was held on April 1-3, 1997, and May 6, 1997, before this Court. In accord with the Court's instructions, counsel filed appropriate post-trial briefs. (Docs. #84-87).

The Court has carefully considered the in-court testimony, the deposition testimony, the numerous exhibits introduced into evidence, and the legal authorities cited by the parties in their briefs. The Court enters the following findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52 (a).[4] *See e.g. Knaack Manufacturing Co. v. Rally Accessories, Inc.*, 955 F.Supp. 991, 993 (N.D. Ill. 1997). To the extent (if any) that the Findings as stated may be deemed conclusions of law, they shall also be considered Conclusions. *See United States ex rel. Green v. Washington,*

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[4] Fed. R. Civ. P. 52(a) provides:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 [.]

917 F.Supp. 1238, 1240 (N.D.Ill. 1996) In the same way, to the extent (if any) that matters later expressed as Conclusions may be deemed findings of fact, they shall also be considered Findings. *Id.* (*citing Miller v. Fenton*, 474 U.S. 104, 113-14 (1985) ("Perhaps much of the difficulty in this area stems from the practical truth that the decision to label an issue a 'question of law,' a 'question of fact,' or a mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis.")).

Uncontested Material Facts[5]

1. Coolsaet is a corporation organized under the laws of the State of Michigan, and is engaged, inter alia, in the business of underground pipeline repair. Coolsaet is an employer within the meaning of the NLRA, 29 U.S.C. § 152(2). Coolsaet's principal place of business is Romulus, Michigan.

2. Ryan Colonello is Coolsaet's Manager, Pipeline Construction Estimating, and is responsible for the preparation of bids and oversight of all its pipe-line construction and repair work.

3. Robert Reeve is a Job Superintendent regularly, employed by Coolsaet.

4. Local 150 is an unincorporated association and a labor union. Local 150 is a labor organization within the meaning of section 152 (5) of the NLRA, 29 U.S.C. § 152 (5). Local 150's principal place of business is 6200 Joliet Road, Countryside, Illinois 60525.

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[5] The parties stipulated to 45 Uncontested Material Facts in the Amended Pretrial Order. (*See* Doc. #50, *see also* Doc. #85 at p. 1 n.1).

5. Local 150's geographic jurisdiction includes the territory 30 miles west of Ohio and all of Northern Indiana, as well as of Northern Illinois and seven counties into Iowa.

6. This territory is divided into eight separate districts, Kankakee County, Illinois, lies within the geographic jurisdiction of District 2, the office for which is located in Joliet, Illinois.

7. William E. Dugan is, and at all times relevant to this action was, the president/business manager for Local 150.

8. As president/business manager for Local 150, William Dugan is in charge of hiring the business agents and setting the direction of the local union.

9. Joseph Ward is, and at all times relevant to this action was, the treasurer for Local 150. As treasurer, Mr. Ward is also in charge of the business agents in Illinois.

10. Michael J. Quigley is, and at all times relevant to this action was, a business representative for Local 150.

11. Gary Benefield is, and at all times relevant to this action was, a business representative for Local 150.

12. The business agents assigned to District 2 include Mike Quigley and Gary Benefield.

13. The responsibilities of business agents include servicing the membership, policing the various collective bargaining agreements, handling grievances, and organizing non-union companies.

14. The offices of District 2 are located at 1050 North I-55, Frontage Road, Joliet, Illinois. District 2 covers Kankakee, Will, and Grundy Counties.

15. The International Union of Operating Engineers ("IUOE") is the parent body of Local 150. The IUOE

offices are located in Washington, D. C. Since November of 1990, Howard L. "Bud" Evans has been the assistant to the general president of the International Union of Operating Engineers and director of the Pipe Line Department.

16. As director, Mr. Evans oversees all the collective bargaining agreements which cover gas and natural gas pipe lines throughout the country. Mr. Evans' responsibilities also include maintaining records of various reported jobs throughout the country, participating in pre-job conferences, and assisting in the resolution of any problems which may arise.

17. Haley Brothers Excavating, Inc. ("Haley Brothers") is a corporation owned and operated by three brothers – Howard, George, and Charles Haley.

18. Haley Brothers was incorporated on January 1, 1986; its main office is located at Rural Route 2, Box 28, Clifton, Illinois.

19. Haley Brothers normally employs about five full-time employees throughout the year. The company also will hire part-time employees on an "as-needed" basis; all three brothers are involved in the supervision aspect of the projects.

20. Haley Brothers is not signatory to any labor contracts but rather performs its work non-union.

21. Natural Gas Pipeline Company of America ("Natural Gas" or "NGPL") is a wholly-owned subsidiary of Midcon Corp.

22. Natural Gas operates a natural gas storage and distribution facility located on Herscher Road near Herscher, Kankakee County, Illinois, known as the Herscher-Galesville Storage Field.

23. The Herscher-Galesville Storage Field is located beneath hundreds of acres of arable land to which

Natural Gas holds a variety of easements, lease, and mineral rights; it is capable of storing 65 billion cubic feet of natural gas. Within that acreage is an 80-acre, fenced-in, rectangular parcel where NGPL operates its compression equipment, known as Compressor Site 201 or Station 201.

24. Station 201 fronts on Herscher Road and has three entrance gates.

25. At the Herscher-Galesville storage facility, natural gas piped from west Texas, New Mexico, Kansas, and offshore Texas is compressed and stored under pressure in subterranean rock formations.

26. Herscher-Galesville is actually two different rock formations, the Galesville and Mount Simon, lying 1600 feet and 2300 feet underground, respectively. Natural gas is injected into and withdrawn from the formations by "well-heads" disbursed over the storage facility. The well-heads are connected by a pipeline system emanating outward in ever decreasing sizes from the pumping station in a manner akin to the human cardiovascular system, with the compression station resembling the human heart.

27. In 1991, Natural Gas awarded a series of contracts to excavate, install, and perform maintenance on gas and water pipe lines leading into its compressor Station 201.

28. Coolsaet was awarded the contract to perform the project's first phase.

29. Coolsaet's work involved the repair and upgrading of underground, natural gas pipe at, and around, Station 201.

30. Coolsaet began work on the contract's first phase in 1991.

31. On March 23, 1992, Coolsaet and a representative of Local 150 met to conduct the pre-job conference for the Herscher pipe line project. Other similar pre-job conferences were conducted between Coolsaet representatives from Pipe Fitters Local 81 and Teamsters Local 705.

32. In 1992, Haley Brothers bid on and was awarded a contract with Natural Gas for a water distribution project in Herscher, Illinois.

33. Natural Gas awarded a separate contract to perform water pipe maintenance and installation work to Haley Brothers.

34. Natural Gas contracted with Haley Brothers to install and upgrade high density polyethylene pipe which would be used to pump salt water from one pump or well to another, to help in the storage of natural gas.

35. Haley Brothers would dig approximately two miles (8-10,000 feet) of ditches approximately forty inches deep, lay the pipes which had been "butt-fused" or welded together, and then cover the ditches back up.

36. Haley Brothers owned all the equipment it used at the job site, except the fusion machines; it borrowed one from Natural Gas and rented two from a dealer in Minnesota.

37. Coolsaet is a pipe line contractor and a member of the Pipe Line Association ("PLCA"). Coolsaet is a signatory to a collective bargaining agreement (the "National Agreement") between the PLCA and the International Union of Operating Engineers ("IUOE"). The PLCA and Coolsaet also are parties to collective bargaining agreements with other unions, including the United Association ("UA") , International Brotherhood of Teamsters ("Teamsters") and the Laborers International Union ("Laborers").

38. Pursuant to the terms of its agreement with the IUOE, and prior to beginning work at the Herscher, Illinois, work site, Coolsaet entered into an agreement with Local 150, which incorporated the terms of the National Agreement. At all times relevant to this action, a collective bargaining agreement was in effect between Coolsaet and Local 150 which governed the rates of pay, work rules, and working conditions for certain of Coolsaet's employees.

39. Pursuant to the National Agreement and its other subsidiary agreements with Local 150 and appropriate Locals of the UA, the Teamsters, and the Laborers, Coolsaet hired 60-70 employees from various trades to perform work required at Station 201 pursuant to its contract with Natural Gas, including 17 operating engineers referred from Local 150's hiring hall.

40. On or about June 22, 1992, Coolsaet Union Steward Roger Seale noticed the presence of Haley Brothers on the job site and notified Local 150 Business Agent Gary Benefield.

41. From June 24, 1992, up to and including July 7, 1992, members and representatives of Local 150 began picketing at the Natural Gas site in Herscher, Illinois.

42. Local 150's picket signs stated:

IUOE
Local #150
AFL-CIO

ON STRIKE

AGAINST

HALEY BROS.

FOR RECOGNITION AS MAJORITY
BARGAINING REPRESENTATIVE OF
COMPANY'S OPERATING
ENGINEER EMPLOYEES

43. The pickets acted at the direction of Local 150 and its business agents and officers.

44. Local 150's picketing resulted in a refusal by the unionized Coolsaet employees (*i.e.*, UA, Teamsters, Laborers, and Operating Engineers) to report to work, including the approximately 17 operating engineers represented by the Union.

45. At no time did Coolsaet file a grievance under the National Agreement against Local 150 alleging a violation of the Pipeline Agreement's no-strike clause for the Union's activity occurring between June 24 and July 7, 1992.

(*See* Doc. #50 at p. 1-7).

Bench Trial Findings of Fact

46. Prior to the strike, Coolsaet employees did not work in proximity to Haley Brothers. (Tr. at p. 30-31, 36-37, 75-76, 103, 114-115, 411-412, 465-468).

47. On the morning of June 23, 1992, Union Steward Roger Seale and Business Agent Gary Benefield met

at the main entrance to Station 201. (Tr. at p. 114, 231).

48. Roger Seale and Gary Benefield then drove out to "Saffer 3" which was the "well head" and/or "location" where Haley Brothers was working. (Tr. at p. 114-116, 231; Filiatrault Dep. at p. 65-66).

49. The Saffer 3 location could not be seen from Station 201. (Tr. at p. 231). Saffer 3 was three to five miles northwest of Station 201, and it took 15 minutes to drive from Station 201 to Saffer 3. (Tr. at p. 38, 113, 115, 231; Filiatrault Dep. at p. 66).

50. Upon arriving at Saffer 3, Business Agent Gary Benefield spoke to Charles Haley and tried to persuade Haley to join Local 150 or to organize as a union. Haley refused to organize as a union. (Tr. at p. 112, 116, 231-232; Pl. Ex. #34).

51. Benefield told Charles Haley that a union contractor was already in the area and that union members should have been contracted to do the work. (C. Haley Dep. at p. 26).

52. On June 23, 1992, at 7:45 a.m., John Filiatrault of Natural Gas was told to go to Saffer 3. (Filiatrault Dep. at p. 65, Pl. Ex. 34).

53. Upon arriving at Saffer 3, Filiatrault spoke to Gary Benefield and asked why Local 150 had a "problem" with Haley Brothers working on Saffer 3. (Filiatrault Dep. at p. 72, Ex. 34). Filiatrault told Benefield that the Haley Brothers project was a "separate job, separate contract, separate system, and separate ditch line." (Filiatrault Dep. at p. 72; Ex. #34). Filiatrault also stated that Natural Gas was a non-union company and that Natliral Gas had the right to hire non-union workers. (Filiatrault Dep. at p. 72-74; Pl. Ex. #34).

54. Despite Filiatrault's statements, Gary Benefield told Filiatrault that a picket might occur as a result of Haley Brothers' presence on the jobsite. (Filiatrault Dep. at p. 74; Pl. Ex. #34; Tr. at p. 119, 238-239).

55. During the afternoon of June 23, 1992, Union Steward Roger Seale told Coolsaet's Superintendent, Robert Reeve, that union members would not work beside nonunion workers and that a strike might occur if Haley Brothers remained on the jobsite. (Tr. at p. 394-397).

56. Roger Seale also told Coolsaet Office Manager Timothy Liggett on June 23, 1992, that Haley Brothers should not be on the jobsite and that the union would consequently strike. (Liggett Dep. at p. 105).

57. When Natural Gas became aware of Local 150's intention to strike, Natural Gas scheduled a meeting with union representatives. (Tr. at p. 39). However, Natural Gas cancelled the meeting because it realized that the dispute was between Coolsaet and their unions, not between the unions and Natural Gas. (Tr. at p. 39).

58. On June 23, 1992, shortly after the Natural Gas meeting was cancelled, Gary Benefield called the other craft union representatives to inform them that Local 150 would possibly begin a picket on June 24, 1992. (Tr. at p. 239, *see also* Tr. at p. 119-120).

59. When Gary Benefield called the other union representatives he did so with the knowledge that these union agents represented employees who worked for Coolsaet. (Tr. at p. 240-241)

60. There were three entrances to Station 201, the Main Gate (Gate #1) , which was used by some Coolsaet employees, Gate Number 2, which was usually

locked, and Gate Number 3, which was used exclusively by Coolsaet employees. (Tr. at p. 141-143, 155, 330).

61. On June 24, 1992, Gary Benefield set up pickets in front of Station 201 at the Main Gate (Gate 1), Gate 3, and the right-of-way where Haley Brothers had been working on June 23, 1992. (Tr. at p. 124, 241-242).

62. The Coolsaet job was completely shut down when the picketing began because the unionized Coolsaet employees refused to cross the picket line. (Tr. at p. 41; *see also* Uncontested Fact #44).

63. Bob Wiley, as well as other Coolsaet employees, picketed in front of Station 201. (Tr. at p. 126, 307-308, 414-415)

64. At no time did Local 150 attempt to locate and picket the Haley Brothers' Offices. (Tr. at p. 241, 374-375)

65. As of June 25, 1992, Local 150 Business Agent Michael Quigley was the individual primarily responsible for supervising Local 150's activity in relationship to Natural Gas, Coolsaet, and Haley Brothers. (Tr. at p. 329).

66. From June 25, 1992, to July 7, 1992, Michael Quigley was in charge of Local 150's picketing activities. Tr. at p. 329)

67. During the strike, Michael Quigley knew that the only individuals who used Gate 3 were Coolsaet employees. (Tr. at p. 330).

68. Haley Brothers stored various materials for its water line work in Station 201. (Tr. at 52, C. Haley at p. 52). However, on June 25, 1992, Haley Brothers removed its materials from inside the fenced area at Station 201. (Tr. at p. 52; C. Haley Dep. at p. 22-23; Filiatrault Dep. at p. 87-88, 93-94; Pl. Ex. #33, 34).

69. On June 25, 1992, at the request of Local 150 Business Agent Michael Quigley, David Nightingale met with Quigley; Gary Billings, the Plumbers Local 81 business manager; and Alan Nourie, the Teamsters' business representative. (Tr. at p. 41).

70. During this meeting, Quigley stated that he was concerned about Haley Brothers working at the Herscher jobsite. (Tr. at p. 330-331).

71. During this meeting, David Nightingale informed the union representatives that Haley Brothers materials had been removed from Station 201 and asked the representatives why pickets remained in front of Station 201 as opposed to where Haley Brothers was working. (Tr. at p. 50-53; Pl. Ex. #34).

72. In response, Quigley stated that Local 150 had the right to picket where it would be most effective. (Tr. at p. 50, 331-332, Pl. Ex. #32)

73. Local 150 maintained pickets in front of Station 201 from June 25, 1992, to July 7, 1992, even though Haley Brothers no longer stored materials at the Station and despite the fact that Union Business Agents did not know whether Haley Brothers was actually working at the times of the picketing. (Tr. at p. 50-53, 244-257).

74. On or about June 29, 1992, Ryan Colonello, Coolsaet's Manager of Pipeline Construction, telephoned Michael Quigley. (Tr. at p. 489). During this conversation, Quigley stated that as long as Haley Brothers was on the jobsite, the picketing would not end. (Tr. at p. 490).

75. On June 25, 1992, Hailey Roberts, Managing Director of the Pipeline Contractors Association ("PLCA") faxed a letter to Frank Hanley, General President of the International Union of Operating Engineers ("IUOE") informing him that Local 150 had both

established a picket line and was refusing to work in violation of the no-strike clause of the National Pipe Line Agreement, (Tr. at p. 204; Pl. Ex. #6).

76. The June 25th letter stated:

Dear Frank [Hanley]:

R.L. Coolsaet Construction Co. has been awarded a contract by natural Gas Pipe Line Co. of America for construction and reconditioning of the Herscher Gatesville Gathering System in Herscher, Illinois. Part of this work is within the fence of the Natural Gas compressor station at Herscher. We have been advised by Coolsaet that a picket has been established at the primary gate which is unrelated to the work being constructed by Coolsaet. There is a separate gate for all Coolsaet employees; however, Operator employees as well as employees represented by the other three crafts under the National Pipe Line Agreement have refused to return to work. We consider this a breach of [*Article IX*][6] of our National Pipe Line Agreement with the International Union of Operating Engineers which prohibits any interference directly or indirectly with the operation and progress of the work. We request you take immediate action to ensure that members of the International Union of Operating Engineers return to

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[6] *See* Bench Trial Transcript at page 204 wherein Patrick Teilborg states that the letter dated June 6, 1992, contained a typographical error. Specifically, Teilborg testified that: "the 1992 agreement was changed to that – should be Article IX rather than X. It's a typographical error."

work. Please advise concerning your actions in this matter.

Sincerely yours,
/s
Hailey A. Roberts

(Pl. Ex. #6).

77. On June 30, 1992, Howard "Bud" Evans, the IUOE's Director of Pipeline and Assistant to the General President, faxed a copy of Roberts' June 25th letter, along with a cover note to Bill Dugan, President and Business Manager of Local 150 and an IUOE Vice President. (Tr. at p. 611-613).

78. Howard "Bud" Evans' note to Bill Dugan stated:

Dear Bill [Dugan]:

Enclosed is a FAX received from the Pipe Line Contractors Association regarding the R.L. Coolsaet job in Herscher, Illinois for Natural Gas Pipe Line Company. I am sure you are aware that [Article IX] of the National Pipeline Agreement contains a no strike clause. Please advise this office of the current status of the Coolsaet project.

Fraternally yours,

Howard (Bud) Evans
Director of Pipe Line

(Pl. Ex #9)

79. On July 2, 1992, Local 150 Treasurer Joe Ward told Howard "Bud" Evans that the picket line would come done [sic] on Monday, July 6, 1992. (Tr. at p. 612).

80. When the pickets did not come down on July 6th, Howard "Bud" Evans sent a second letter to Bill

Dugan ordering Local 150 to remove the picket line. Tr. at p. 612-613; Pl. Ex. #10).

81. The second letter drafted by Howard "Bud" Evans dated July 6, 1992, read as follows:

Dear Bill [Dugan]:

Per my phone conversation with Joe Ward on Thursday, July 2, 1992, 1 understood the picket line on the Herscher, Illinois job for Natural Gas Pipe Line, where R.L. Coolsaet Construction Company also has a job, would be down on Monday, July 6, 1992.

Today, I received a call at 9:50 a.m. from the Pipe Line Contractors Association saying the line is still up in spite of the fact that a reserved gate has been established. After trying and failing to reach Joe Ward by phone, and after discussing this situation with General President Hanley, based upon the facts as represented Local 150 is hereby directed to remove the picket line immediately and allow the signatory contractors to the National Pipe Line Agreement to resume work on their projects.

Fraternally yours,
/s
Howard (Bud) Evans
Director of Pipe Line

(Pl. Ex. 10).

82. Over a fifteen year period, 1978 through 1993, the parties to this action were members to three collective bargaining agreements. (Tr. at p. 192 - 200).

83. The collective bargaining agreement ("National Agreement") which governs the instant dispute was effective from January 1, 1989 through January 1, 1993. (Jt. Ex. #1, and 2).

84. The National Agreement contained a no-strike clause. (Tr. at p. 192; Jt. Ex. #1 and 2).

85. The no-strike clause provided as follows:

IX.
WORK STOPPAGES

(A) No local union nor the International Union, nor any representative of either, shall cause or promote a strike, slowdown, stoppage of work or any interference, directly or indirectly, with the operation and progress of the work; nor shall any Employer or the Pipe Line Contractors Association engage in any lockout during the life of this Agreement, it being the good faith intention of the parties hereto that by the execution of this Agreement industrial peace shall be maintained. All grievances, disputes, differences of opinion and other questions concerning this Agreement shall be settled in accordance with the procedure for settlement of grievances and disputes set out in [Article X] below. Any settlement where hours of pay are involved shall be retroactive.

(B) if the local union or any representative thereof causes or promotes a strike, slowdown, stoppage of work or any interference with the operation or progress of the work, or if the Employer breaches this Agreement, then the Employer (where the local union interfered with the work) or the local union (where Employer has breached the Agreement) may at its option declare the provisions of [Article X] inoperative and seek whatever remedy may be available from the National Labor Relations Board or any Federal or State court having jurisdiction of the matter.

(C) If the International Union or any representative thereof causes or promotes a strike, slowdown, stoppage of work or any interference with the operation or progress of the work, or if the Employer breaches this Agreement, then the Employer (where the International Union interfered with the work) or the International Union (where Employer has breached the Agreement) may at its option declare the provisions of [Article X] inoperative and seek whatever remedy may be available from the National Labor Relations Board or any Federal or State court having jurisdiction of the matter

(D) It shall not be a violation of this Agreement or of the no-strike clause if members of the International Union of Operating Engineers refuse to cross a picket line established by another craft union within the pipe line industry.

(Jt. Ex. #1 at P. 14-15).

86. The National Agreement also contained a procedure for settlement of disputes which provided as follows:

X.
PROCEDURE FOR SETTLEMENT OF GRIEVANCES AND DISPUTES

(A) Any grievances, disputes or differences of opinions which arise between the contractors' supervisory personnel and union representatives in the field shall be settled on the job whenever possible; provided that such settlements shall not vary any of the wages, terms or conditions of this Agreement.

(B) If a grievance, dispute or difference of opinion cannot be settled on the job within

forty-eight (48) hours, then such matter must be referred within ten (10) days by the Union representative in the field to the appropriate international Union representative, and the contractors' supervisory personnel must within the same time period refer the matter to the contractors' executive personnel and, if necessary, to the Managing Director or Executive Director of the Pipe Line Contractors Association. These parties shall immediately make every effort to settle the grievance, dispute or difference of opinion.

(C) Any grievance, dispute, difference of opinion or controversy of any kind or character between the Union and the Association and/or individual Employer signatory hereto involving or relating to the interpretation, construction or application of the terms of this Agreement, and the relations between the parties arising during the term of this Agreement which cannot be settled by the parties, shall be settled by the arbitration procedure which is set out below.

(Jt. Ex. #1 at p. 15).

87. The no-strike clause in the National Agreement represents a fifteen year drafting effort by the parties to the agreement to eliminate work stoppages caused by recognitional picketing. (Tr. at p. 192-193, Cf. Pl. Ex. 55, 56 and JT. Ex. 1).

88. In 1984, the collective bargaining agreement was specifically revised to allow contractors like Coolsaet to file a cause of action in federal court if a union violated the no-strike clause. (Tr. at p. 196).

89. After the pickets came down, Coolsaet work left exposed during the strike had to be redone. (Tr. at p. 434).

90. Although the strike ended as of July 8, 1992, the foremen for coolsaet did not report back to work until Monday, July 13, 1992. (Tr. at p. 417, 419-420).

91. Some employees, including one-third of the welder force, and one foremen never returned. (Tr. at p. 421).

92. As a result of the strike, the Coolsaet repair project lost momentum to such an extent that it was similar to starting the project over again. (Tr. at p. 432-433, 123, Pl. Ex. 29).

93. The projected completion or "tie-in" date before the strike was July 4, 1992. (Tr. at p. 62, 403-404, 488).

94. Final "tie-in" did not occur until August 4, 1992. (Tr. at p. 436, 505).

95. The Coolsaet gas line repair projects was prolonged a period of twelve (12) days as a result of the strike. (*See* Findings of fact 89-94)

Conclusions of Law

1. The Defendant Union intended to exert pressure on Coolsaet, a neutral or secondary employer, at the Herscher jobsite, in violation of section 8 (b) (4) of the National Labor Relations Act.

2. The terms of the collective bargaining agreement did not require Coolsaet to arbitrate its breach of contract claim before seeking redress in federal court.

3. The Defendant Union expressly waived its right to engage in sympathy strikes by entering into the collective bargaining agreement.

4. The Defendant Union breached the collective bargaining agreement by violating the no-strike clause.

5. Coolsaet was damaged as a result of the Union's unlawful secondary boycott.

6. Coolsaet is entitled to damages in the amount of $329,467.46 pursuant to section 303 of the National Labor Relations Act, codified at 29 U.S.C. § 187.

DISCUSSION

In reaching the findings of fact set forth above, the Court found much of the testimony of Union Steward Roger Seale, Business Agent Gary Benefield, and Business Agent Michael Quigley to be strong and detailed. However, their testimony concerning facts which were critical in deciding the actual issues before the Court appeared vague and selective and, therefore, lacked credibility. For example, it was hard for the Court to accept that a person who could remember minute, innocuous details at trial could not recall or became evasive about major determinative facts to which he had testified in his deposition. The trial testimony of all three men is replete with examples of such selective recollection of events.

LEGAL ANALYSIS

Unlawful Secondary Boycott

Counts One through Four of Plaintiff's Complaint state a cause of action under section 303 of the LMRA, 29 U.S.C. § 187, which creates a private right of action for money damages for any person who is injured by union conduct which violates section 8 (b) (4) of the NLRA. *Mautz & Oren, Inc. v. Teamsters, Chauffeurs, and Helpers Union, Local No. 279*, 882 F.2d 1117, 1120 (7th Cir. 1989). Section 8 (b) (4), in turn, makes unlawful various forms of

secondary boycotting or picketing activity. *Id.* Union conduct violates section 8 (b) (4) "if any object of that activity is to exert improper influence on secondary or neutral parties." *International Union of Operating Engineers, Local 150, AFL-CIO v. NLRB*, 47 F.3d 218, 223 (7th Cir. 1995) (*citing Local Union No. 501 v. NLRB*, 756 F.2d 888, 892 (D.C.Cir. 1985)).

In *Mautz & Oren, Inc.*, the Seventh Circuit explained:

> "The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern to it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands." Where a union has a grievance with the terms and conditions of employment of a certain employer, (the "primary" employer), it must focus its picketing activity on that employer. The union may not exert pressure on an unrelated, "secondary" employer in order to coerce the secondary employer to cease dealing with the primary employer, thereby advancing the union's goals indirectly. If the union acts with "mixed motives," partially primary and partially secondary, its conduct is unlawful under section 8 (b) (4); "[i]t is not necessary to find that the sole object of the strike was secondary so long as one of the union's objectives was to influence" the secondary employer to bring pressure to bear on the primary."

Mautz & Oren, Inc., 882 F.2d at 1120-21. (citations omitted). Whether the union was motivated by a secondary objective is a question of fact, and is to be determined

through examination of the "totality of [the] union's conduct in [the] given situation." *International Union of Operating Engineers, Local 150, AFL-CIO v. NLRB*, 47 F.3d at 223 (*citing NLRB v. Chauffeurs, Teamsters, Warehousemen*, 773 F.2d 921, 923 (7th Cir. 1985); *NLRB v. Local 307, Plumbers, etc.*, 469 F.2d 403, 408 (7th Cir. 1972)).

While section 8 (b) (4)'s prohibition of "secondary" activity seems straightforward, application of that principle becomes complicated where the primary and secondary employers occupy a common work site. *Mautz & Oren, Inc.*, 882 F.2d at 1121. In such "common situs" situations, the union has every right to picket the primary employer at the work site, even though this picketing might incidentally, but foreseeably, have a substantial effect on secondary employers. *Id.* Section 8 (b) (4) proscribes only union activity whose "object" or purpose is to coerce secondary employers. *Id.* There is an important distinction between intending to enmesh secondary employers in a dispute not their own, and acting with knowledge that secondary employers will inevitably be affected by the union's actions. *Id.* Even if the union's picketing has substantial (and foreseeable) secondary effects, that conduct does not violate section 8 (b) (4) unless the employer satisfies its burden of establishing that the union intended to cause disruption of the secondary employer's business. *Id.*

In order to provide an evidentiary framework in which to evaluate claims of illegal secondary motivation in common situs cases, the NLRB adopted the *Moore Dry Dock* standards. *Id.* Under these standards, a union's picketing is presumed to be lawful primary activity if:

> (1) The picketing is strictly limited to times when the situs of the dispute is located on the secondary employer's premises:
>
> (2) At the time of the picketing the primary employer is engaged in its normal business at the situs;
>
> (3) The picketing is limited to places reasonably close to the location of the situs; and
>
> (4) The picketing discloses clearly that the dispute is with the primary employer.

Id. (citing Sailor's Union of the Pacific (Moore Dry Dock), 92 N.L.R.B. 547, 549 (1950)). It is important to note that the *Moore Dry Dock* standards are not to be applied mechanistically, but with common sense; while compliance with (or violation of) the standards may give rise to a presumption of lawfulness (or illegality), these standards are not dispositive. *Id.* The question throughout remains a factual inquiry into the union's actual state of mind under the totality of the circumstances. *Id.*

In the instant action, it appears that Judge Baker, in his Order denying summary judgment, erroneously concluded that both parties agreed that *Moore Dry Dock* would govern the disposition of this case. (*See* Doc. #41 at p. 2). However, Plaintiff's memorandum in support of its motion for summary judgment made abundantly clear that, in Plaintiff's view, *Moore Dry Dock* had no application here since Station 201 "was not a common situs." (*See* Doc. #26 at p. 34). Nevertheless, whether the Court employs the *Moore Dry Dock* framework or not, the evidence in this case established that Defendants engaged in unlawful secondary boycott. Thus, whether or not Defendants' complied with the standards set forth in *Moore Dry*

Dock is of no consequence. *See e.g. Mautz & Oren, Inc.*, 882 F.2d at 1121 (observing that compliance with the *Moore Dry Dock* standards may give rise to a presumption of lawfulness but that the standards are not dispositive).

Based on the findings of fact set forth above, the Court finds that Coolsaet has satisfied its burden of establishing that the Union intended to disrupt Coolsaet's project at the Herscher jobsite. Specifically, the evidence indicates that one of the Union's objectives in establishing the picket lines at the Herscher jobsite was to stop unionized Coolsaet employees from going to work. This objective would then, in turn, induce Natural Gas to pressure Haley Brothers into unionization and/or cause Natural Gas to terminate its contract with Haley Brothers. In so doing, the Union engaged in unlawful secondary boycott in violation of section 8 (b) (4) of the NLRA. The Court will briefly explain its reasoning below.

Local 150 did not want nonunion workers, *i.e.* Haley Brothers, working at the Herscher jobsite. However, even though the Union's grievance was specifically with Haley Brothers, the Union did not limit its picketing activities to the specific area where Haley Brothers was actually working, *e.g.* Saffer 3, nor did it attempt to locate and picket the Haley Brothers offices. Rather, *Coolsaet employees* and other Local 150 members participated in picket lines established at the Main Gate and Gate 3 of Station 201.

Local 150 established pickets in front of Gate 3 from June 24, 1992, to July 7, 1992, despite the fact that Gate 3 was exclusively used by Coolsaet employees. Moreover, Local 150 continued to picket in front of Station 201 even

after being informed that Haley Brothers had removed all of its materials from that station. In addition, Local 150 maintained its picket lines without regard to whether Haley Brothers was on the jobsite or not.[7] Furthermore, the Union's Business Agents told representatives of Natural Gas and Coolsaet that the picket lines would only come down if Haley Brothers was removed from the Herscher jobsite.

The law in this area is well established and clearly contrary to the Union's conduct: "[w]here a union has a grievance with the terms and conditions of employment of a certain employer, . . . it must focus its picketing activity on that employer." *Mautz & Oren, Inc.*, 882 F.2d at 1121. Unfortunately, in this case, the Union intentionally focussed its picketing activity on secondary employers, *i.e.* Coolsaet and Natural Gas. As a result, their conduct was unlawful.

For example, if Local 150 did not intend to exert improper influence on Coolsaet, then the Union would certainly not have had Coolsaet employees participate in

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[7] Business Agent Gary Benefield testified that he did not necessarily know whether Haley Brothers was on the Herscher jobsite when he would set up the picket lines. (*See e.g.* Tr. at p. 244-248). Presumably, defense counsel tried to minimize the import of admissions like this by eliciting testimony which established that Haley Brothers was in fact working at the Herscher jobsite during the entire period that the picket lines were maintained. (*See e.g.* Tr. at p. 83) . However, if Union representatives did not know whether Haley Brothers was present on the jobsite and, nevertheless, established the daily picket line, then the Union's unlawful motive may manifest itself regardless of whether Haley Brothers was in fact present on the jobsite or not.

the picketing lines. As another example, once David Nightingale told Michael Quigley on June 25, 1992, that all of the Haley Brothers' materials had been removed from Station 201, Quigley should have directed the union picketers to take the picket line down at that location.[8] At the very least, Quigley should have had the pickets removed from Gate 3 since Quigley knew that that gate was exclusively used by Coolsaet employees.

In addition, as stated above, Union representatives did not locate and picket the Haley Brothers' offices. In the Court's view, if the Union did not intend to exert improper influence on neutral employers then the Union would have thoroughly investigated Haley Brothers in order to perfect an effective picket line as to the *object* of its grievance. Here, however, the Union simply established picket lines at locations where they would most effectively influence neutral employers.

Furthermore, Business Agent Gary Benefield's testimony during the bench trial made abundantly clear that the picket lines were not established with specific regard to Haley Brothers. Indeed, on *the first day* that Benefield set up the picket line, he did not even know if Haley Brothers was on the Herscher jobsite. Finally, both Benefield and Quigley told Coolsaet and Natural Gas representatives that the picket lines would come down only if Haley Brothers were removed from the Herscher jobsite. In so doing, these Union representatives were overtly

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[8] The union argues that it continued to picket at Station 201 because Haley Brothers continued to pick up parts provided by Natural Gas at the station after June 25th. In short, the Court finds that this explanation is nothing more than pretext.

exerting improper pressure on neutral employers. Accordingly, after viewing the totality of the Defendant Union's conduct, the Court finds that the preponderance of the evidence reveals that the Union engaged in an unlawful secondary boycott at the Herscher jobsite from June 24, 1992, to July 7, 1992.

The Union argues that when multiple employers occupy a common work site, "the Union has every right to picket the primary employer at the work site, even though this picketing might incidently, but foreseeably, have a substantial effect on neutral employers." (See Doc. #85 at p. 9 (*quoting Mautz & Oren*, 882 F.2d 1121)). Accordingly, the Union asks the Court to analyze the legality of its conduct pursuant to *Moore Dry Dock*. While the Union's legal propositions are correct, this is not necessarily a common work situs case. Indeed, at no point did Haley Brothers and Coolsaet employees work at the same location. In fact, at all times relevant to this dispute, the Haley and Coolsaet projects were at least one mile apart.

In the Court's view, the *Moore Dry Dock* framework contemplates a work site in which a union *cannot* picket *without* secondary effects because of the geographic nature or parameters of the work site itself, *e.g.* a shipping dock or coal mine. Here, however, the Union could have easily picketed Haley Brothers at Saffer 3 or at the Haley Brothers' offices without effecting the Coolsaet or Natural Gas operations at Station 201. In any event, even if the Court did analyze this case under *Moore Dry Dock*, the result would not change since Local 150 did not strictly limit picketing to times when Haley Brothers was working. Indeed, the evidence adduced at trial indicates

that Local 150 established its picket lines without regard to where and when Haley Brothers was working. In this way, the *Moore Dry Dock* analysis inculpates rather than exculpates the Union. Moreover, as stated above, the evidence shows that the Union intended to disrupt the business operations of Coolsaet, and in the Court's view, as the trier of fact, neither *Moore Dry Dock* nor any other evidentiary framework, would or could change this fact. *See Mautz & Oren*, 882 F.2d at 1121 (in an action claiming unlawful secondary boycott, the question throughout the proceedings remains a factual inquiry into the union's actual state of mind under the totality of the circumstances).

Breach of No-Strike Clause

Coolsaet alleged in Count V of its Complaint that the Union breached the collective bargaining agreement by violating the terms of the no-strike clause. *See* 29 U.S.C. § 185; Section 301 of the LMRA. In response, the Union maintains that Coolsaet's breach of contract claim must fail because Coolsaet did not exhaust contract remedies, or alternatively because the Union did not waive its right to engage in sympathy strikes. The Court will take up the Union's arguments in turn.

Section IX(A) of the collective bargaining agreement provides that "[a]ll grievances, disputes, differences of opinion and other questions concerning this Agreement shall be settled in accordance with the procedure for settlement of grievances and disputes set out in [the arbitration clause]." Thus, since Coolsaet did not seek to

arbitrate the instant dispute, the Union insists that Coolsaet's section 301 claim must fail. (*See* Doc. #85 at p. 16 (*citing Mautz & Oren*, 882 F.2d at 1126 ("The Supreme Court has specifically held that an employer must exhaust available arbitral remedies before suing a Union under section 301 for damages related to an alleged breach of a no-strike obligation.").

Conversely, Coolsaet argues that section IX provides that if a union causes a work stoppage, the employer may, at its option, declare the provisions of the arbitration clause inoperative and proceed to federal court. (Doc. #84 at p. 11) Specifically, Section IX(B) provides:

> (B) If the local union or any representative thereof causes or promotes a strike, slowdown, stoppage of work or any interference with the operation or progress of the work, or if the Employer breaches this Agreement, then *the Employer (where the local union interfered with the work) or the local union (where Employer has breached the Agreement) may at its option declare the provisions of [the arbitration clause] inoperative and seek whatever remedy may be available from the National Labor Relations Board or any Federal or State court having jurisdiction of the matter.*

Thus, Coolsaet maintains that it was under no obligation to arbitrate its breach of contract claim because Coolsaet filed the instant action in federal court and thereby exercised its option to declare the provisions of the arbitration clause inoperative. (*See* Doc. #84 at P. 11). Coolsaet cites *Drake Bakeries, Inc. v. Local 150*, 370 U.S. 254, 259-60 (1962), for the proposition that exhaustion of arbitral remedies is not required where actions for breach of "no-strike

clauses" are excluded from the scope of the particular arbitration clause.

In *Drake*, the employer had filed an action for damages under section 301, alleging that the union had "instigated and encouraged its members to strike or not to report to work," in violation of a no-strike clause. *Id.* at 256. The collective bargaining agreement contained a broad arbitration clause covering "all complaints, disputes or grievances arising between [the parties] involving questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties [ ] directly or indirectly." *Id.* at 257. The employer argued that the promise not to strike was so basic to the collective bargain and breach of the no-strike clause so completely inconsistent with the provision for arbitration that the employer's duty to arbitrate was excused by the union's breach. *Id.* at 258. The U.S. Supreme Court rejected the employer's argument and stated:

> The company has not attempted, or claimed the right, either to terminate the entire contract or to extinguish permanently its obligations under the arbitration provisions. Instead, it has sued for damages for an alleged strike and, as far as this record reveals, the contract continued in effect, as did the promises of the parties to arbitrate and the promise of the union not to strike. *Moreover, in this case, under this contract, by agreeing to arbitrate all claims without excluding the case where the union struck over an arbitrable matter, the parties have negatived any intention to condition the duty to arbitrate upon the absence of strikes.*

Id. at 261-262 (emphasis added).

Clearly, the provisions of the collective bargaining agreement in this case and those in *Drake* are quite different. There, the collective bargaining agreement simply declared that *all* disputes would be arbitrated. Here, however, the collective bargaining agreement specifically provides that Coolsaet has the option of filing an action in federal court if the Union causes a work stoppage. Thus, under the clear terms of the collective bargaining agreement, where the Union causes a work stoppage, Coolsaet may file an action for breach of contract in federal court.

The Union relies on the Seventh Circuit's holding in *Mautz & Oren* to support its argument that Coolsaet was required to arbitrate its breach of contract claim. However, the collective bargaining agreement in *Mautz & Oren* apparently did not contain the "opt-out" option made available in the instant agreement. *See Mautz & Oren*, 882 F.2d at 1126-1127. Clearly, in this case, the Union entered into a collective bargaining agreement that allowed the Union and the Employer to opt out of the arbitration clause if, for example, a work stoppage occurred. The Union argues that it should get what it bargained for. The Court agrees, and this is precisely why Coolsaet was not obligated to pursue arbitration before filing this action.

Next, the Union argues that it did not breach the collective bargaining agreement because "a broad no-strike clause provision by itself is not sufficient to waive the right to engage in sympathy strikes if extrinsic evidence of the parties' intent does not demonstrate that the parties' mutually agreed to include such rights within the breadth of the no-strike clause." (*See* Doc. #85 at p. 16 (*citing Indianapolis Power and Light Company v. NLRB*, 898 F.2d 524, 528 (7th Cir. 1990) (held that employer violated

National Labor Relations Act by disciplining employee who engaged in sympathy strike, since union did not waive right of employee to engage in sympathy strikes in no-strike clause in collective bargaining agreement)).

Coolsaet insists that the Union "unmistakably waive[d] the right to engage in sympathy strikes. *(See* Doc. #11 at p. 11 *(citing Inland Steel Co. v. NLRB,* 719 F. 2d 205, 207 (7th Cir. 1983)). The Court agrees. In *Inland Steel Co.,* the issue before the Seventh Circuit Court of Appeals was whether an express no-strike provision in a collective bargaining agreement precluded an employee from engaging in a sympathy strike. *Id.* There, the court determined that sympathy strikes were prohibited because (1) the no-strike clause and the arbitration clause appeared in different sections of the collective bargaining agreement; (2) the language of the no-strike clause was not limited to arbitrable disputes; and (3) the stated purpose of the agreement was to promote cooperation in order to improve productivity and insure employment security as well as company profits. *Id. Quoting United States Steel Corp. v. NLRB,* 711 F.2d 772, 777 (7th Cir. 1983), the court stated:

> [W]here a broad no-strike clause is functionally independent of an arbitration clause in a labor contract and the contract shows that the no-strike obligation was not given merely in exchange for the duty to arbitrate but because of the parties' common interest in achieving uninterrupted plant operations, the no-strike clause constitutes a clear and unmistakable waiver of an employee's right to engage in a sympathy strike.

id.

The instant case is indistinguishable from *Inland Steel*. Here, as there, the no-strike clause and the arbitration clause appear in different sections of the collective bargaining agreement. Here, as there, the language of the no-strike clause is not limited to arbitrable disputes. And finally, here, as there, the stated purpose of the agreement is to maintain "industrial peace." The Union accordingly waived its right to engage in sympathy strikes and thus it breached the no-strike clause when it caused the work stoppage at the Herscher jobsite. (*See also* Findings of Fact 75-88).

Damages

Section 303 authorizes damages for "whoever shall be injured in his business or property by reason of any violation of" the secondary boycott provisions of the National Labor Relations Act, 29 U.S.C. § 187. *John B. Cruz Construction Co. Inc. v. United Brotherhood of Carpenters*, 907 F.2d 1228, 1232 (1st Cir. 1990). The guiding principle in establishing Section 303 damages is neither punishment nor speculation; the goal is to reach a just and reasonable approximation of the actual injury suffered. *American Bridge Division, U.S. Steel Corp. v. IUOE*, 772 F.2d 1547, 1153 (8th Cir. 1985). "While the employer must prove that he has sustained some injury to his business or property, he need not detail the exact amount of damages suffered. It is sufficient if the evidence supports a just and reasonable approximation." *Refrigeration Contractors, Inc. v. Local Union No. 211*, 501 F.2d 668, 671 (5th Cir. 1974). In *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499 (7th Cir. 1992), the Seventh Circuit explained:

> Although uncertainty created by wrongful acts does not insulate the wrongdoer from liability, "people who want damages have to prove them, using methodologies that need not be intellectually sophisticated but must not insult the intelligence." Compensatory damages must rest on "a just and reasonable estimate of the damages based on relevant data." Allowance for uncertainty is one thing, and rank speculation another.

Id. at 505-506. (citations omitted).

Coolsaet seeks $367,231.64 in damages. This amount represents the following:

1.	Payroll during strike	$ 12,016.45
2.	Equipment cost during strike (11 days)	$ 68,651.00
3.	Legal bills resulting from strike (July 5, to July 14, 1992)	$ 4,786.46
4.	Airline/Rental Car/Motel for meetings	$ 449.50
5.	Two additional weeks payroll and insurance	$169,947.70
6.	Two additional weeks fringe benefits (Average of four payroll periods between end of strike and "tie-in")	$ 30,038.94
7.	Two additional weeks equipment costs (12 days)	$ 70,812.00
8.	Two additional weeks – welders' rigs	$ 5,832.50

9.	Labor costs due to meetings and clerical costs of strike	$ 848.18
10.	One month additional cost for office, office furniture, and motel for key personnel (two weeks of strike and two additional weeks due to strike)	$ 3,298.91
11.	Two additional weeks – mechanics' rigs	$ 550.00
	TOTAL:	$367,231.64

(Pl. Ex. 61 at P. 1) Coolsaet maintains that it is entitled to recover the costs it incurred during the strike as well as the costs it incurred because of "post-strike delays." *(See* Doc. #84 at p. 7).

The Union argues that the Court should only award damages for the harm actually suffered by Coolsaet as a result of unlawful picketing as opposed to damages it may have sustained as a result of lawful picketing. (Doc. #85 at p. 17 *(citing Boxhorn's Big Muskego Gun Club, Inc. v. Electrical Workers Local 494*, 798 F.2d 1016, 1021-23 (7th Cir. 1986)). This argument may be well grounded in law but is not applicable under the facts of this case. It is true that the legal picketing of Haley Brothers at its worksite differed from the illegal picketing at Station 201 not just in location but also in its objective. Unlike Station 201, the Haley Brothers' worksite was not the ideal location to directly impact Coolsaet employees and, as taught by *Boxhorn's Big Muskego Gun Club,* the effects of the legal picketing should be, where possible separated out of the damage award. *See Id.* However, there is nothing in the record to allow the Court to identify what if any impact

this legal picketing had on Coolsaet employees and their decision to stop work. Absent such a showing, it would be sheer speculation to reduce Coolsaet's damages in that regard.

The Union also argues that Coolsaet is not entitled to an award of damages because "there is no causal nexus between any unlawful activity and any harm to the company." (Doc. #85 at p. 17). The Union states:

> Equally important, there is no evidence to establish a causal link between the 11 work days lost to the picketing and the additional two weeks delay the Company argues stemmed from that picketing.

(Doc. #85 at P. 18).

For the reasons set forth below, the Court is not persuaded. First, when the strike began on June 24, 1992, the projected completion or "tie-in" date was July 4, 1992. Thus, the project was scheduled to "tie-in" eleven (11) calendar days and nine (9) working days after the strike began (Saturday, July 4, 1992, Holiday). The strike lasted until July 7, 1992, or eleven (11) working days. Coolsaet resumed work on the repair project on July 8, 1992, and completed the job twenty-three (23) working days later, on August 3, 1992. The additional, twelve (12) days beyond the nine (9) days Coolsaet needed to complete the project had there been no strike *is* attributable to the strike. Thus, absent evidence to the contrary,[9] Coolsaet

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[9] During the bench trial, Defense Counsel did elicit testimony which indicated that two weeks prior to the strike, Coolsaet employees worked overtime and that, after the strike,

can recover its expenses associated with the twelve (12) day delay in completing the project.

Moreover, Robert Reeve testified at the bench trial that the strike caused the Coolsaet project to lose momentum. Tim Liggett testified that once the picket lines were down, it was like "starting over again." In addition, during the strike, work in the fields was left exposed to the elements and consequently had to be redone once the workers returned to the project. Finally, one-third of Coolsaet's welder force did not return to the Herscher project after the strike. In light of these facts, the Court finds that there is a reasonable nexus between the strike and the eventual delay.

The Court will award damages as follows. Coolsaet is awarded $12,016.45 for payroll expenses during the strike. (Pl. Ex. 61 at Ex. A). Coolsaet may also recover for

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Coolsaet employees did not work overtime. (*See e.g.* Tr. at p. 166-169). Accordingly, when Coolsaet moved the tie-in date up to July 4, 1992, Coolsaet must have considered the progress that had been made and would be made as a result of overtime. The Union suggests, therefore, that part of the delay following the strike was due to the fact that Coolsaet employees were not asked to work overtime. In this vein, the twelve-day delay that Coolsaet has exclusively attributed to the strike may over estimate the delay the strike actually caused. However, the Union has not provided a basis or an equation by which the Court could reasonably reduce the twelve-day period of delay by the number of hours of overtime recorded before and after the strike. Surely, the Court cannot view these circumstances in a vacuum and simply reduce the period of delay by one day for every twenty-four hours of equivalent overtime that could have been recorded after the strike. Section 303 of the NLRA clearly prohibits this sort of speculation, and the Court will decline the Union's invitation to do so.

equipment cost during the strike, however, the Court will calculate these costs by the "stand-by rate." (*See* Pl. Ex. 61 at Ex. B; Pl. Ex. 21).[10]

EQUIPMENT		STAND-BY RATE	
300 Cat Hoe	11 days	$305.00	$ 3,335.00(*)
225 Cat Hoe	11 days	$265.00	$ 2,915.00
580 Case Hoe	11 days	$120.00	$ 1,320.00
20 Ton Grove	11 days	$200.00	$ 2,200.00(*)
D7 Dozer	11 days	$210.00	$ 2,310.00
850 Dozer	11 days	$145.00	$ 1,595.00(*)
572 Sideboom	11 days	$210.00	$ 2,310.00
572 Sideboom	11 days	$210.00	$ 2,310.00
D7 Sideboom	11 days	$170.00	$ 1,870.00
D7 Sideboom	11 days	$170.00	$ 1,870.00
561 Sideboom	11 days	$150.00	$ 1,650.00
561 Sideboom	11 days	$150.00	$ 1,650.00
Lowboy	11 days	$200.00	$ 2,200.00(*)
Crane Truck	11 days	$150.00	$ 1,650.00(*)
Skid Truck	11 days	$ 75.00	$ 825.00(*)
Gin Pole Truck	11 days	$ 70.00	$ 770.00
Pick Ups(5)	11 days	$43.00	$ 2,365.00
Road Boring	11 days	$145.00	$ 1,595.00(*)
Parts Van	11 days	$ 3.00	$ 33.00(*)
TOTAL:			$34,773.00

Coolsaet may only recover for attorney's fees on the basis that it incurred those fees to effectuate resumption

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[10] Plaintiff's exhibit number 21 does not specifically set forth the standby rate for each piece of equipment that Coolsaet utilized. However, the standby rates appear to be about one-half of the regular hourly rate. Thus, where exhibit 21 does not provide the standby rate, the court will reduce the hourly rate by one-half.

of work. *Capeletti Brothers, Inc. v. Local #487*, 514 F.2d 1239 (5th Cir. 1975). Since Coolsaet was billed for attorney's fees for services rendered after the strike, the Court will only award Coolsaet the following:

Amount Sought	(4,786.46)
7/8/92	$1,375.00
7/19/92	$ 137.50
7/10/92	$ 357.50
7/13/92	$ 220.00
7/14/92	$ 825.00
Total Award:	$1,871.46

(Pl. Ex. 61 at Ex. C).

The Court will award damages for airline and motel costs described on line 4 of the summary of damages. However, the Court will only award $326.50 since one expense ($123.00, 7/14/97) appears to have been incurred well after the strike had ended. The Court will award the amounts sought in sections 5, 6, 7, 8, 10, and 11. Finally, the Court will not award damages for the labor costs ($848.18) sought in section 9 of Coolsaet's summary of damages. Thus, the total award of damages is:

1.	Payroll During Strike	$ 12,016.45
2.	Equipment Costs During Strike	$ 34,773.00
3.	Legal Bills	$ 1,871.46
4.	Airline/Motel Bills	$ 326.50
5.	Two Additional Weeks Payroll	$169,947.70
6.	Two Additional Weeks Fringe Benefits	$ 30,038.94
7.	Two Additional Weeks Equipment	$ 70,812.00

8.	Two Additional Weeks Welder Rigs	$ 5,832.50
9.	Labor Costs	$ 0.00
10.	One Month Furniture Costs	$ 3,298.91
11.	Mechanics' Rigs	$ 550.00
	TOTAL:	$329,467.46[11]

The Court finds that this amount is a reasonable approximation of the actual monetary injury that Coolsaet suffered as a result of the Union's unlawful conduct. *See Zazu Designs*, 979 F.2d at 505-506. Indeed, other courts have found that similar costs are properly recovered under Section 303 of the NLRA. *See e.g. American Bridge Division, U.S. Steel Corp. v. IUOE, Local 487*, 772 F.2d 1547 (11th Cir. 1985); *Refrigeration Contractors, Inc. v. Local Union No. 211*, 501 F.2d 668 (5th Cir. 1974); *Metropolitan Paving Company, Inc. v. IUOE*, 439 F.2d 300 (10th Cir. 1971). Accordingly, the Court finds that Coolsaet is entitled to recover *$329,467.46* in damages pursuant to section 303 of the NLRA.

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[11] Amount of Damages not recoverable:

Standby Equipment Rate	$ 33,878.00
Attorney's Fees	$ 2,915.00
Airline Motel	$ 123.00
Labor Costs	$ 848.18
Total	$ 37,764.18
Total Amount Sought	$367,231.64
Total Amount Awarded	$329,467.46
Difference	$ 37,764.18

CONCLUSION

IT IS THEREFORE ORDERED that the Clerk of the Court enter JUDGMENT, in favor of Plaintiff, R.L. Coolsaet Construction Company, and against Defendants, Local 150 and International Union of Operating Engineers, AFL-CIO, in the amount of $329,467.46. IT IS FURTHER ORDERED that Plaintiff has up to and including December 12, 1997, in which to file a brief setting forth the bases for prejudgment interests. IT IS FURTHER ORDERED that Defendant file a responsive pleading by December 26, 1997.

ENTERED this 21st day of November, 1997.

/s/ Joe Billy McDade
JOE BILLY McDADE
United States District Judge

APPENDIX B

Statutes Involved

Section 8(b) of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U.S.C. § 158(b) is as follows:

§ 158. Unfair labor practices
(b) Unfair labor practices by a labor organization

It shall be an unfair labor practice for a labor organization or its agents –

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in

the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in any industry affecting commerce, where in either case an object thereof is -

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement, authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (c) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

Section 8(e) of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U.S.C. § 158(e) is as follows:

§ 158. Unfair labor practices
(e) Enforceability of contract or agreement to boycott any other employer; exception

It shall be an unfair labor practice for any labor organization and any employer to enter into any

contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible [sic] and void; *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

Section 301 of the Labor Management Relations Act, as amended, 61 Stat. 156, 29 U.S.C. § 185 is as follows:

§ 185. Suits by and against labor organizations
(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any

district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena [sic], or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Section 303 of the Labor Management Relations Act, as amended, 61 Stat. 158, 29 U.S.C. § 187 is as follows:

§ 187. Unlawful activities or conduct; right to sue; jurisdiction; limitations; damages

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason or[1] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this

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[1] So in original. Probably should read "of."

title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

(June 23, 1947, c. 120, Title III, § 303, 61 Stat. 158; Sept. 14, 1959, Pub.L. 86-257, Title VII, § 704(e), 73 Stat. 545.)

Supreme Court, U.S.
FILED
OCT 14 1999
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No. 99-442

IN THE

Supreme Court of the United States

LOCAL 150, INTERNATIONAL UNION
OF OPERATING ENGINEERS,

Petitioner,

v.

R.L. COOLSAET CONSTRUCTION CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly affirmed a damages award where the district court found that the damages incurred were actual damages and were directly attributable to petitioner's conduct?

2. Whether the court of appeals correctly affirmed an award of prejudgment interest where prejudgment interest was necessary to full compensation?

PARTIES TO THE PROCEEDING

All parties are identified in the caption to this case.

CORPORATE DISCLOSURE STATEMENT

Respondent, R.L. Coolsaet Construction Co. has no parent corporation or publicly held company owning 10% or more of the corporation's stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Cited Authorities	iv
Opinions Below	1
Statement of Jurisdiction	1
Statutes Involved	1
Statement of the Case	1
I. Petitioner Engaged In A Strike Held Unlawful By The District Court And The Court Of Appeals.	2
II. Respondent's Damages.	4
Reasons for Denying the Writ	6
I. The Seventh Circuit's Decision On Damages Does Not Conflict With Holdings Of This Court Or The Ninth Circuit.	7
II. The Seventh Circuit's Award Of Prejudgment Interest Does Not Conflict With Holdings Of This Court Or The Second Circuit.	9
Conclusion	11

TABLE OF CITED AUTHORITIES

Page

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Matson Plastering Co. v. Plasterers & Shophands Local No. 66, 852 F.2d 1200 (9th Cir. 1988) 8

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Statutes:

28 U.S.C. § 1254(1) 1

29 U.S.C. § 158(b)(4) 2, 3

29 U.S.C. § 185 ..... 2, 3

Rule:

Sup. Ct. R. 10 ..... 7, 10

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 177 F.3d 648 (7th Cir. 1999). Pet. App. 1.[1] The order of the Central District of Illinois is not reported. Pet. App. 26.

STATEMENT OF JURISDICTION

The district court entered judgment in favor of R.L. Coolsaet Construction Co. on November 24, 1997. The Seventh Circuit affirmed on May 7, 1999. A petition for rehearing *en banc* was denied on June 14, 1999. This Court granted petitioner until September 13, 1999, to file its petition for certiorari. The petition was filed on September 13 and docketed on September 14, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The petition for writ of certiorari correctly identifies the relevant statutes in this case.

STATEMENT OF THE CASE

This action arises out of a strike by petitioner Local 150, International Union of Operating Engineers, when Natural Gas Pipeline Company of America hired both union and non-union contractors (including respondent, a unionized

1. "Pet. App." refers to the appendix attached to Local 150's petition for writ of certiorari. This brief also uses the following citation forms: "Pet." refers to Local 150's petition for writ of certiorari; and, "S.A." refers to Local 150's short appendix submitted to the Court of Appeals for the Seventh Circuit.

contractor) to repair pipelines at its gas storage facility in Herscher, Illinois. Pet. App. 2. On respondent's suit, the district court and court of appeals found the Union's strike to be an illegal secondary boycott in violation of 29 U.S.C. § 158(b)(4) of the National Labor Relations Act ("NLRA") and a breach of the no-strike clause in the collective bargaining agreement between petitioner and respondent, in violation of section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. Pet. App. 25, 48.

In its petition, the Union does not question the lower courts' conclusions that it engaged in an illegal secondary boycott and that it breached the no-strike clause in the parties' collective bargaining agreement. Instead, petitioner asserts only that the evidence does not support the computation of damages made by the district court and affirmed by the court of appeals. Petitioner simply reargues its own witnesses' version of the events, including witnesses who were expressly discredited by the district court, and asserts that, on the issues of damages and prejudgment interest, the Seventh Circuit improperly interpreted the factual evidence before it.

I. Petitioner Engaged In A Strike Held Unlawful By The District Court And The Court Of Appeals.

In June 1991, Natural Gas hired respondent R.L. Coolsaet Construction Co., a union contractor, to perform maintenance and repair work on natural gas pipelines leading to its compressor Station 201. Pet. App. 2. Respondent had recognized petitioner, Local 150, as the representative of certain of its employees and had entered into a collective bargaining agreement with petitioner for the Natural Gas job. *Id.* Natural Gas also hired Haley Brothers Excavating Company, a non-union contractor, to perform work on the water pipelines in the fields surrounding Station 201. *Id.*

Shortly after the arrival of Haley, employees of respondent Coolsaet who belonged to petitioner Local 150 initiated a picket at Station 201 to protest Natural Gas's hiring of a non-union contractor, Haley. Pet. App. 3-4. Petitioner did not set up the picket at the Haley jobsite, however, which was located miles away from Coolsaet's site, nor did petitioner set up the picket at Haley's offices. Pet. App. 3-4, 40. Instead, petitioner set up its picket in front of respondent Coolsaet's jobsite and outside the entrance gate to Station 201, which was used exclusively by Coolsaet employees. Pet. App. 3-4. As a result, unionized Coolsaet employees refused to cross the picket line and Coolsaet's job was completely shut down for eleven working days. Pet. App. 4, 17. In addition to the eleven days of the strike itself, Coolsaet's project was prolonged by twelve days as a result of the strike. Pet. App. 17.

The district court found that petitioner's picketing was a violation of section 8(b)(4) of the NLRA, because petitioner did not focus its picket on Haley, the employer with which it had a grievance; rather, petitioner intentionally focused its picketing activity on secondary employers, i.e., Coolsaet and Natural Gas. Pet. App. 54. The court of appeals affirmed the district court's decision and found that at least one of petitioner's objectives was to unlawfully pressure Coolsaet and Natural Gas into forcing Haley off the Herscher site. Pet. App. 11. The district court also concluded that petitioner's strike and picketing breached the no-strike clause in the parties' collective bargaining agreement, in violation of section 301 of the LMRA. Pet. App. 48. Based on the district court's review of the structure of the agreement and its bargaining history, the court of appeals affirmed this decision. Pet. App. 17.

II. Respondent's Damages.

The district court found that respondent was damaged as a direct result of petitioner's illegal strike. Pet. App. 49. In particular, the court found that respondent suffered injury both because of eleven days of work stoppage for the strike itself and also because of an additional period of two weeks after the strike ended when respondent was still recovering from the strike's effects. Pet. App. 65-66. The court found that non-strike injury flowed from the loss of momentum caused by the strike, the work exposed to the elements during the strike that needed to be redone when the job resumed, and the fact that one-third of respondent's welder force did not return to the Herscher project after the strike and had to be replaced. Pet. App. 66. In reaching its factual conclusions, the district court explicitly discredited the testimony of three of petitioner's witnesses (Benefield, Quigley, and Seale) on key factual issues. Pet. App. 49. As the court stated, "their testimony concerning facts which were critical in deciding the actual issues before the Court appeared vague and selective and, therefore, lacked credibility." *Id.*

The district court determined that there was a reasonable nexus between the unlawful strike and the eventual two weeks of delay after the strike had ended. Pet. App. 66. Consequently, the court held that respondent was entitled to damages for its pecuniary losses for that period, as well as for the time of the strike itself. Pet. App. 65-66. It determined that the injury sustained by respondent included costs for payroll expenses, equipment costs, legal bills, transportation costs, two weeks additional payroll, insurance, fringe benefits, rig rentals, labor costs, and office-related costs, for a total of $329,467.46. Pet. App. 69. According to the district court, this amount was a "reasonable approximation of the actual monetary injury that Coolsaet suffered as a result of the Union's unlawful conduct." *Id.*

As instructed by the district court, the parties filed supplementary briefs on the issue of prejudgment interest. The district court awarded Coolsaet prejudgment interest in the amount of $16,097.14. On reconsideration, Coolsaet argued that the court had failed to consider the five years between the strike and the judgment, and, subsequently, the district court amended its final judgment and awarded respondent prejudgment interest of $105,221.12. The district court did not, however, grant Coolsaet prejudgment interest for equipment costs which were included as part of its damage award, because they were not "out-of-pocket" expenses. S.A. 56. Local 150 filed a notice of appeal, contesting the district court's rulings, including the final judgment and amended final judgment awarding prejudgment interest. Coolsaet cross-appealed, contesting the district court's failure to award prejudgment interest on equipment costs.

The Seventh Circuit affirmed all of the district court's liability conclusions. Pet. App. 25. It agreed that Local 150 had engaged in illegal secondary activity and breached the no-strike clause of the collective bargaining agreement, discussing the evidence that supported the district court's decision. Pet. App. 9, 11, 17. The court of appeals also refused to disturb the credibility determination made by the district court, pointing out that when findings of fact are based on the credibility of witnesses, appellate review is particularly deferential. Pet. App. 10. As the court of appeals stated, "only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Id.*

The Seventh Circuit also affirmed the district court's lengthy calculation of damages, finding that the damages

incurred were compensable because they were "directly attributable to the strike." Pet. App. 18. However, the court reversed the district court's failure to award prejudgment interest to respondent for equipment costs. Pet. App. 22-24. The court explained that there was no reason, nor any supporting case law, for treating the equipment costs differently than other damages awarded and that without prejudgment interest "plaintiff is not fully compensated." *Id.* As a result, the Seventh Circuit concluded that respondent also was entitled to prejudgment interest on its equipment costs and remanded for a recalculation of prejudgment interest. Pet. App. 24-25.

Local 150 subsequently filed a petition for a rehearing and suggestion for rehearing *en banc*. The court of appeals denied the petition, stating that "no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing." Order of June 14, 1999.

REASONS FOR DENYING THE WRIT

Rather than present a genuine conflict or other basis sufficient to support certiorari, petitioner merely repeats its unabashed efforts to overturn credibility assessments and evidentiary conclusions made by the district court. Such factual determinations are of course within the sound discretion of the trial court and do not warrant this Court's review. Consequently, the petition does not raise any question worthy of this Court's consideration.

I.

THE SEVENTH CIRCUIT'S DECISION ON DAMAGES DOES NOT CONFLICT WITH HOLDINGS OF THIS COURT OR THE NINTH CIRCUIT.

Petitioner argues that the Seventh Circuit erred in affirming a damages award where Coolsaet failed to show the damages were incurred by reason of unlawful conduct or were actually sustained by Coolsaet. Pet. 10. However, the sole support offered by petitioner for this position is its repeated assertion of a view of the facts that was rejected by the district court. Pet. 11-14. Indeed, petitioner argues nothing more in its petition than what was asserted to the Seventh Circuit, which aptly observed, "[e]ssentially, the union counters each key fact with its own version of events, reiterating what it argued before the district court." Pet. App. 10. As provided in this Court's Rules, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings." Sup. Ct. R. 10. Moreover, petitioner has not identified any objective or documentary evidence that even remotely supports its version of events, much less demonstrates that the credibility findings were manifestly incorrect. Instead, petitioner makes the insufficient argument that the court of appeals erred in not approving its version of events.[2] Then, in the final

2. Demonstrating the extent to which the petition is based on petitioner's refusal to accept the district court's credibility assessments and factual findings, petitioner's statement of the case repeatedly cites to the trial transcript, including testimony expressly discredited by the district court, rather than to the district court's actual findings of fact. Pet. at 2, 4, 6, 18. In doing so, petitioner relies on the testimony of its witnesses, Benefield, Quigley and Seale,

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paragraphs, petitioner asserts that the Seventh Circuit's decision is in conflict with a Ninth Circuit decision and with decisions of this Court. That assertion is simply untrue.

Petitioner first purports to identify a conflict with the Ninth Circuit decision in *Matson Plastering Co. v. Plasterers & Shophands Local No. 66*, 852 F.2d 1200 (9th Cir. 1988). The claim is unmeritorious. While petitioner correctly notes that *Matson* holds that "damages recoverable under section 303 include actual compensatory damages for out-of-pocket expenses paid to third parties," neither this passage nor the holding in that case states that such expenses are the only injuries compensable under section 303. 852 F.2d at 1203; Pet. 14. As the Seventh Circuit recognized when petitioner asserted this argument below, "[n]othing in *Matson* [ ] supports this constrained approach to damages. On the contrary, that court discussed lost profits — something neither out of pocket or paid to third parties — as a recoverable item under the NLRA." *Id.* at 1202; Pet. App. 19-20. In short, the conflict asserted by petitioner does not exist.

Similarly, the Seventh Circuit's decision is perfectly in accord with the principles espoused by this Court in *Local 20, Teamsters, Chauffeurs and Helpers Union v. Morton*,

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yet fails to reveal that the district court discredited their testimony as "vague and selective and, therefore, lack[ing] credibility." Pet. App. 49. For example, petitioner supports its statement that Union steward Seale "is not an agent or officer of the Union" by referring to the trial transcript of Seale's testimony, without mentioning that the district judge expressly discredited this testimony. Equally misleading, petitioner fails to point out that prior to trial the parties *stipulated* that Seale is an agent or representative of the Union. Pre-Trial Order, p. 9.

377 U.S. 252 (1964). This Court held that recovery for "a union's peaceful secondary activities proscribed by s[ection] 303 should be limited to actual, compensatory damages." *Id.* at 260. That holding is consistent with the Seventh Circuit decision herein, which concluded that the twelve-day delay, the work that needed to be redone, and the problem re-mobilizing the workforce were "directly attributable to the strike and the expenses associated with them are compensable." Pet. App. 18. Thus, the damages awarded to respondent were "actual compensatory damages" in accordance with this Court's precedent. Petitioner's assertion that Coolsaet's damages were not actually sustained by Coolsaet is merely another effort to overturn the factual conclusions made by the lower court.

II.

THE SEVENTH CIRCUIT'S AWARD OF PREJUDGMENT INTEREST DOES NOT CONFLICT WITH HOLDINGS OF THIS COURT OR THE SECOND CIRCUIT.

Petitioner erroneously asserts that the Seventh Circuit erred in affirming the award of prejudgment interest because petitioner's conduct was not in fact intentional or outrageous. Pet. 15. In support of this proposition, petitioner misrepresents the Seventh Circuit case, *Gorenstein Enters., Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431 (7th Cir. 1989), and claims that prejudgment interest is available "only where 'the violation was intentional, and indeed outrageous.' " Pet. 15.

Even if this statement of the law were true, this error would not be the proper basis for granting a petition for a writ of certiorari, as the error would merely be the

"misapplication of a properly stated rule of law." Sup. Ct. R. 10. However, the statement is also patently incorrect. In *Gorenstein*, the Seventh Circuit announced a rule that "prejudgment interest should be *presumptively* available to victims of federal law violations" and that it is "*particularly appropriate*" where "the violation was intentional, and indeed outrageous." 874 F.2d at 436 (emphasis added). Petitioner's error is in the assertion that the circumstances in which prejudgment interest is "particularly appropriate" are the only ones in which it is allowed. Similarly, the court in *Beelman Truck Co. v. Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 525*, 33 F.3d 886 (7th Cir. 1994), decided that the union had engaged in unlawful, intentional conduct, but did not hold that intentional conduct was a required condition of entitlement to prejudgment interest. *Id.* at 892.

Equally spurious is petitioner's attempt to fabricate a conflict among the circuits. This argument is also based on petitioner's attempt to recast the facts found by the courts below. After providing a lengthy discussion of the Second Circuit decision in *Wickham Contracting Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, AFL-CIO*, 955 F.2d 831 (2d Cir. 1992), petitioner maintains that this decision supports its conclusion that prejudgment interest is only available when the violation of federal law is intentional or outrageous. Pet. 16. Petitioner then offers its own version of the facts, insisting that its picketing was not intentional and that "Local 150 acted innocently." Pet. 18-19. This argument thus relies exclusively on disagreement with the lower court's factual findings. Moreover, the argument is misguided. While the court in *Wickham* determined that prejudgment interest *may be* inappropriate where the defendant had no reason to know of the wrongfulness of its actions, that is not the case

here. *See Wickham*, 955 F.2d at 834 (emphasis added); Pet. App. 22. As the Seventh Circuit recognized, the district court *found* an unlawful intent. Pet. App. 22, 54. As a result, *Wickham* does not provide petitioner with any basis for asserting that prejudgment interest was improper.[3]

Finally, the petition asserts that the award of prejudgment interest conflicts with the law of this Court. Petitioner has failed, however, to identify any case law or reasoning with which the award conflicts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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3. The size of the prejudgment award is also consistent with *Wickham* and is simply the result of compounding interest during the time respondent had been deprived of the money owed to it. *Wickham*, 955 F.2d at 837.